Supreme Court, U.S.
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IN THE

United States Supreme Court

OCTOBER 1998 TERM

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED FOR REVIEW

Whether notification procedures in a Federal Rule 23(b)(3) class action litigation are Constitutionally infirm under the Fourteenth Amendment to the United States Constitution where an identifiable class member who has general knowledge of the existence of a class action litigation is not given individual notice containing the information required by Rule 23(b)(2) of the Federal Rules of Civil Procedure.

STATEMENT OF INTERESTED PARTIES

The parties to this proceeding are the Appellant, Patrick L. Tessier, and the In re: Combustion, Inc. Plaintiff's' Steering Committee, c/o Mr. Calvin C. Fayard, Fayard & Honeycutt, 519 Florida Ave., Denham Springs, Louisiana 70726.

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IN THE UNITED STATES SUPREME COURT
OCTOBER 1998 TERM

No. _____

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Patrick L. Tessier respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. In furtherance of his petition, Mr. Tessier shows the Court as follows:

OPINIONS BELOW

The initial opinion of the Fifth Circuit in this matter was unpublished, but is cited as *Combustion v. Tessier*, 103 F.3d 124 (5th Cir. 1996) and is reprinted in the Appendix (App.) at page 19a . The opinion over which writs are currently sought is also unpublished and the cite is currently unavailable. This opinion is reproduced at App. p. 2a . The United States District Court for the Western District of Louisiana issued two separate opinions, neither of which is believed to be officially reported. The district court opinion directly at issue in this writ application is reproduced at App, p.5a. The opinion from which the first appeal was taken is reproduced at App., p. 28a .

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was issued on September 18, 1998. A timely petition for rehearing was denied by the Court of Appeals on November 20, 1998 (App. p. 17a. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

Federal Rules of Civil Procedure Rule 23(c)(2):

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

United States Constitution, Amendment Fourteen, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Statement of the Facts.

Mr. Patrick Tessier owns a tract of land within one-quarter mile of a toxic waste site in Livingston Parish, Louisiana which is the source of the litigation in the In re: Combustion, Inc. class action lawsuit. He has owned this land for more than fifteen years, though he moved to East Baton Rouge Parish before this litigation began and is an absentee class member. Among the claims being made against the various defendants in the class action are claims for diminution in the value of immovable property. The defined class includes, among others, all persons or entities that own property in Livingston Parish, Louisiana. It is undisputed that Mr. Tessier is a class member.

Despite the close proximity of Mr. Tessier's land to the waste site in issue, the Plaintiff's Steering Committee, hereafter, "PSC", never gave him actual notice by mail or any other means of the pendency of the class action. In fact, the PSC did not send any notice to any class member who did not first contact the PSC in some way.

Accepting the district court's apparent finding Mr. Tessier knew of the existence of the class action prior to the deadline for filing a proof of claim, the record is devoid of any evidence that he knew any of the information required by Rule 23(c)(2) notice. Mr. Tessier has consistently asserted that he had no such knowledge.

2. Course of Proceedings and Disposition in Court Below.

On or about September 11, 1995, Mr. Patrick Tessier filed a request for permission to file a late proof of claim in a Federal Rule 23(b)(3) class action entitled, In re: Combustion, Inc.. At the conclusion of a fairness hearing on September 27, 1995, District Judge Richard T. Haik ruled that the Mr. Tessier had been given sufficient notice of the requirement to complete a Proof of Claim in a timely manner. He also found that Mr. Tessier did not comply with the requirement and did not show good cause for such failure. (App., p. 28a.) On October 24, 1995, Mr. Tessier filed his notice of appeal in this matter with the United States District Court for the Western District of Louisiana.

On November 13, 1996, the Fifth Circuit Court of Appeals

issued a written, unpublished opinion, No. 96-30210, Summary Calendar, addressing Mr. Tessier's appeal along with other appeals. The Fifth Circuit ordered a remand to consider Mr. Tessier's request to join the class of plaintiffs in light of the notice requirements outlined in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct.2140, 40 L.Ed. 732 (1974). (App., p. 27a.)

Pursuant to this remand, the matter came on for hearing again on April 1, 1997 before district Judge Richard T. Haik. After oral and documentary evidence was introduced, the district court took the matter under advisement. On June 13, 1997, Judge Haik issued a Ruling and Order again denying Mr. Tessier's request to complete a late proof of claim. The *Eisen* issues were not addressed in this Ruling. The only reason stated for denying Mr. Tessier's application to file a late proof of claim was that the district judge had difficulty giving credibility to Mr. Tessier's claim he did not know of the litigation. (App., p. 5a,9a, 15a)

On July 7, 1997, Mr. Patrick Tessier again filed a notice of appeal in this matter with the United States District Court for the Western District of Louisiana. On September 18, 1998, the Fifth Circuit Court of Appeals issued a ruling affirming the decision of the District Court as follows: "On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required. (paragraph) Our review of the record, briefs, and applicable law discloses neither error nor abuse of discretion in the district court's credibility call on this issue." (App., p. 4a.)

Mr. Tessier filed a timely request for rehearing asserting that if knowledge of the existence of a lawsuit is equivalent to notice, there was no evidence in the record from which a court could possibly conclude the notice was legally and Constitutionally adequate. The Fifth Circuit denied the petition for rehearing without comment on November 20, 1998. (App., p. 17a.)

Mr. Tessier now files this Petition for Certiorari with the United States Supreme Court.

3. Basis for Federal jurisdiction in Court of Appeal

The original appeal before the Fifth Circuit was from a final Rule 54(b) judgment that certified Mr. Tessier's prior dismissal. The

second appeal, which is now at issue, arises from the direct remand order of the Fifth Circuit. A Court retains jurisdiction over its previous mandates. *National Surety Corp. v. Charles Carter & Co., Inc.* 621 F.2d 739, at 741 (5th Cir. (La.) 1980).

REASONS FOR GRANTING THE WRIT

Introduction

Mr. Patrick Tessier requests the United States Supreme Court grant his petition for writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit that sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction. By the plain language of Rule 23(c)(2) of the Federal Rules of Civil Procedure and this Court's opinions in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct.2140, 40 L.Ed. 732 (1974) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), identifiable class members are entitled to individual notice apprising them of the pendency of the class action and informing them of rights and deadlines. In *Eisen v. Carlisle and Jacquelin*, 417 U.S. at 175, 94 S.Ct. 2140, 40 L.Ed. 732 (1974), this Court has stated, "... the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort."

At the hearing on remand in this matter, Mr. Tessier presented abundant evidence in the district court that he was identifiable through reasonable effort, therefore entitled to individual notice. The district court, however, denied Mr. Tessier's application to file a late proof of claim because it apparently found Mr. Tessier knew of the existence of the litigation. On three occasions in its June 13, 1997 Ruling, the District Court stated difficulty giving "credibility" or "credence" to Mr. Tessier's claim that he did not know about the "litigation" or "law suit"[1]. (App., p. 5a, 9a, 15a.)

The Fifth Circuit affirmed and upheld the district court's determination despite Mr. Tessier's arguments that if he did know the class action lawsuit was pending, he did not know any of the information Constitutional and legal notice would have afforded him. No such evidence was presented and no such evidence was cited by the District Court or the Fifth Circuit Court of Appeals.

Mr. Tessier suggests to this Honorable Court there is no precedent in law or in the jurisprudence of any Federal appellate court, including the Fifth Circuit, that allows general knowledge of a class action litigation to be equated with receipt of Constitutionally and legally sufficient notice. To the contrary, in *Mullane*, 339 U.S., at p. 314, this Court observed that sufficient notice must convey specific information:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mr. Tessier further suggests that the holding of the Fifth Circuit imposes a Constitutionally invalid duty on him to investigate and protect his rights before he has knowledge he is a class member. See *Martin v. Wilkes*, 490 U.S. 755 at 765, 109 S.Ct. 2180 at 2186, 104 L.Ed.2d 835 (U.S. Ala. 1989) and *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 at 552, 94 S.Ct. 756 at 765, 38 L.Ed.2d 713 (U.S. Cal. 1974), discussed below.

In the In re: Combustion Inc. class action litigation, no class member received notice unless he or she in some way contacted the Plaintiffs Steering Committee first. The Fifth Circuit has sanctioned a procedure that omits the elementary and fundamental requirement of adequate notice to identifiable class members by equating general knowledge of the pendency of a class action with adequate notice. Mr. Tessier suggests this departure from accepted and settled law carries important ramifications and calls for an exercise of this Court's supervisory power.

Argument and Authorities

I. If knowledge of a lawsuit equates to legal notice, then Mr. Tessier's notice was legally and Constitutionally insufficient.

If knowledge of a lawsuit equates to notice, then the notice given Mr. Tessier was legally and Constitutionally insufficient. Rule

23 (c)(2) in pertinent part says as follows:

> . . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

As recited, the Rule 23 requirements for legal notice include advising each class member of the following:

a) He or she will be excluded from class membership if requested by a specific date;
b) Any judgment will be binding against the class member;
c) If a class member does not request exclusion, he or she may enter an appearance through counsel;
d) Implicit in this is that the class member will be notified he or she qualifies as a class member.

The Advisory Committee to Rule 23 "explicated its incorporation of due process standards by citation to *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and like cases." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174, 94 S.Ct.2140, 2150-2151, 40 L.Ed. 732 (1974).

In *Mullane* the Supreme Court set forth some of the Constitutional requirements for sufficiency of notice under the Fourteenth Amendment. The *Mullane* Court, 339 U.S. at p. 314, stated as follows:

> Against this interest of the state we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that '**The fundamental** (emphasis added) requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

...

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.) The notice must be of such nature as reasonably to convey the required information, (citation omitted), and it must afford a reasonable time for those interested to make their appearance. (Citations omitted.)

Neither Rule 23 nor the Constitution requires individual notice in every instance, but individual notice is required for all class members who can be identified through reasonable efforts. *Eisen v. Carlisle and Jacquelin*, 417 U.S., at 174 *et seq.*. Rule 23, F.R.C.P..

Nonetheless, in accordance with the *Mullane* standard, Constitutionally sufficient notice must include the following:

a) An opportunity to be heard;
b) Information that a matter is pending so a member can choose to appear or default, acquiesce or contest;
c) Notice reasonably calculated to apprise the class member of the pendency of an action;
d) An opportunity for a class member to present his or her objections;
e) The required information must be conveyed;
f) It must afford the class member reasonable time to make his or her appearance;
g) Implicit in these requirements is that the class member be provided sufficient information to determine whether or not he qualifies as a class member.

At best, the District Court concluded Mr. Tessier knew an action was pending. See the District Court's statements at endnote 1. Beyond this finding, there is no evidence in the record showing Mr. Tessier had any knowledge of facts sufficient to comprise legal notice, and the district court or the Court of Appeals for the Fifth Circuit cited none. Accordingly, there is no finding he had knowledge

he might have any interest in the class litigation[2]. There is no finding he knew he had a right to opt out of the class. There is no finding he knew he would be subject to any judgment obtained in the class action. There is no finding he knew he could enter an appearance. There is no finding Mr. Tessier knew he had any rights or any involvement in any way with the In re: Combustion, Inc. class action lawsuit.

If knowledge of the existence of the In re: Combustion, Inc. litigation was Mr. Tessier's notice, the notice was legally insufficient under Rule 23 and the Constitutional precepts set forth in *Mullane*.

II. Knowledge of a lawsuit imposes no duty to intervene.

As the Supreme Court stated concerning the effect of knowledge of a pending lawsuit in *Martin v. Wilkes*, 490 U.S. 755 at 765, 109 S.Ct. 2180 at 2186, 104 L.Ed.2d 835 (U.S. Ala. 1989), "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene (emphasis added), is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."

Specifically regarding class actions, this Court said:

> Not until the existence and limits of the class have been established and notice of membership has been sent (emphasis added) does a class member have any duty to take note of a suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 at 552, 94 S.Ct. 756 at 765, 38 L.Ed.2d 713 (U.S. Cal. 1974).

This Court spoke very plainly in *Eisen v. Carlisle and Jacquelin*, 417 U.S., at 173, 94 S.Ct., at 2150 concerning the Rule 23 requirement that individual notice be sent to all class members whose names and addresses may be identified through reasonable effort:

> We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

Perhaps Mr. Tessier could be estopped from asserting his claim herein if the district court could have properly found he possessed the knowledge that legal, Constitutional notice would have afforded him. But, there is no such finding because there is not a scintilla of evidence proving Mr. Tessier knew anything about the In re: Combustion, Inc. class action other than, possibly, that it was pending. The law imposes no duty on Mr. Tessier to mount a formal investigation to secure his rights. The law and the Constitution require legally sufficient notice.

At best, the district court found that Mr. Tessier "knew" or "had knowledge" of the "litigation" or "law suit". Knowledge of the existence of a lawsuit is hardly knowledge rising even close to the threshold of legally and Constitutionally sufficient notice.

Conclusion

Awareness of the existence of a lawsuit is not legal notice. Neither factually nor legally. Mr. Tessier has complained from the beginning of his involvement in these proceedings that he had no prior notice of these proceedings. There is no finding Mr. Tessier had the knowledge that legally and Constitutionally sufficient notice would have provided. Mr. Tessier has consistently maintained that he had no such knowledge. The district court never concluded or found that Mr. Tessier had such knowledge. At best, the district court has held Mr. Tessier had knowledge that the In re: Combustion, Inc. litigation existed. This is not enough.

Mr. Tessier is asserting his right as an individual to have "the elementary and fundamental requirement of due process"[3] under the Fourteenth Amendment be met. The foundation of the Combustion Inc. litigation was built on shifting and Constitutionally infirm sand. Neither Mr. Tessier, nor thousands upon thousands of class members with sufficient connection to Livingston Parish, were given legally sufficient notice of the pendency of the class action litigation even though their names and addresses were identifiable through reasonable effort.

The Court of Appeals for the Fifth Circuit's sanctioned a

procedure that equates general knowledge of the existence of a class notice. This so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction. Mr. Tessier asks this Court to grant a writ of certiorari in this matter.

Respectfully submitted this 16th day of February 1999.

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[1] The District Court's statements in its June 13, 1997 Ruling were as follows:

P. 5a – "Specifically the Court finds it very difficult to give credibility to Mr. Tessier's contention that he did no know about this litigation prior to the summer of 1995."

P. 9a - "..., the Court has difficulty giving credence to Mr. Tessier's contention that he did not know of the litigation."

P. 15a – "While he (Mr. Tessier) may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit."

[2] The record reflects that the Combustion, Inc. Class action was overwhelmingly one for personal injuries. Mr. Tessier makes no claim for personal injury, but for damage to his property.

[3] *Mullane*, 339 U.S., at p. 314.

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
Filed
Sep 18, 1998
Charles R. Fulbruge III
Clerk

No. 97-30822
Summary Calendar

In re: COMBUSTION, INC.

PLAINTIFFS' STEERING COMMITTEE,

Plantiff-Appellee

versus

PATRICK L. TESSIER,

Movant-Appellant

Appeal from the United States District Court
For the Western District of Louisiana
(94-MDL-4000)

Before POLITZ, Chief Judge, EMILIO M. GARZA and DeMOSS, Circuit Judges.

POLITZ, chief judge:*

This appeal arises out of a mass disaster toxic tort class action involving a hazardous waste dump site located in Livingston Parish, Louisiana. The site served as an oil recycling

center until 1980 and is now known as the Combustion, Inc. Superfund Site.

By December of 1994 over 13,000 claimants had filed proof of claim forms in this action. In July of 1995 the district court approved a preliminary settlement agreement between the class and some of the defendants and ordered a fairness hearing thereon. The court also ordered all class members who had failed to file a timely proof of claim to notify the court of their intention to appear at the hearing and to show good cause why they should be allowed to take part in the litigation.

Patrick L. Tessier notified the court that, as a land owner in the contaminated area, he qualified as a class member and that he had not received notice of the suit until after the deadline for filing proof of claim. At the hearing, Tessier informed the court that his name and address was reasonably ascertainable to the Plaintiffs' Steering Committee and that due process required that he receive personal notice. The district court,

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* Pursuant to 5th CIR. R. 47.5, the Court has determined that this option should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

finding that notice was reasonable and adequate, initially refused to allow Tessier to take part in the litigation.

On appeal, we noted that **Eisen v. Carlisle & Jacquelin**[1] requires that individual notice be given to all class members whose names and addresses are ascertainable through reasonable effort. As it was not clear from the district court's order whether the Eisen standard had been applied, we remanded for this determination.[2] On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required.

Our review of the record, briefs, and applicable law discloses neither error nor abuse of discretion in the court's credibility call on this issue.

The judgement appealed is AFFIRMED.

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[1] 417 U.S. 156 (1974)

[2] Combustion v. Tessier, 103 F.3d 124 (5th Cir. 1996) (unpublished table decision)

U.S. District Court
Western Division of Louisiana
Filed
June 13, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUAS DIVISION

IN RE: COMBUSTION, INC.

*CIVIL ACTION NO. 94MDL4000

* ALL CASES

* JUDGE RICHARD T. HAIK

****

RULING

****

Before the Court, on remand, is the request by Mr. Patrick Tessier to file a late proof of claim. The court believes that the notices disseminated by the Plaintiffs' Steering Committee were reasonably calculated to reach every member of the class in the most practicable method under the circumstances. Specifically the Court finds it very difficult to give credibility to Mr. Tessier's contention that he did not know about this litigation prior to the summer of 1995. For the reasons discussed below, the Court denies the request.

I

A brief background of the facts regarding the site are that in the 1960, Earl Dubose began operating an oil reclamation business in his back yard in Livingston Parish. He had waste oil dumped into the ground pits and sold the oil that separated from the other waste products as recycled fuel oil. Dubose developed the business until 1977 when he sold it to Arthur Gammons. Gammons incorporated the site as Combustion, Inc. and continued operating essentially the same business. The site closed in 1982 because of regulatory and financial problems and was subsequently listed as a Superfund site by the United States Environmental Protection Agency.

The first suit was filed in 1986 in state court in Livingston Parish. The case was removed permanently in 1994 to federal court. Final certification of the Class came in 1993. Geographically, the Class was essentially the entire Parish of Livingston:

> All persons or entities who or which own real or personal property and/or live and/or operate places of business and/or work and/or attend school in Livingston Parish, Louisiana, and/or who have been so situated during the time since the early 1960's, and who or which claim to have sustained damages as a result of the discharge, release or leakage of

> toxic substances from the premises now or formerly known as Dubois Lane and Milton Road and Burgess Road in Livingston Parish, Louisiana.

It is not disputed that Mr. Tessier currently owns property in Livingston Parish, and at the time the Class was certified, he was a member of the Class.

In early April 1993, pursuant to order of the Court, the Plaintiffs' Steering Committee (PSC) mailed the *Important Notice of Certification* to all known Class members and published the notice on March 27 and April 10, 1993, in the Denham Springs News and the Morning Advocate. The certification notice advised Class members of their option to opt-out of the law suit. *See Tessier #2.* These newspapers enjoy extensive, parish-wide circulation. The notice was also posted in the Clerk of Court's office in Livingston Parish.

Pursuant to Fed. R. Civ. Pro. 23(d), the Court then ordered all Class members to file Proof of Claim forms by December 31, 1994. Notice was disseminated in July 1994 in the same manner. *See Tessier #3.* The deadline was later extended until April 11, 1995. A second *Important Notice to Class,* reminding Class members to file a proof of claim forms, was similarly disseminated in early December 1994. *See Tessier*

#4.

On August 10, 1995, after the first wave of settlements were consummated, the PSC instigated another mass mailing notice. *See Tessier #5, #6a, #6b.* The Committee mailed *Important Notice to class Members Regarding Partial Settlement* to sixty-five attorneys who were known to have represented or who were currently representing Class members. This notice was also mailed to all known Class members – 9934 items of mail – along with two newsletters, one to the claimants and the other to the putative Class members. In addition, the notice was published on August 10 and 24, 1995 in the Baton Rouge Advocate and the Denham Springs News, and it was posted in the Clerk of Court's office in Livingston Parish.

This notice announced the $80,000,000 partial settlement and instructed the Class members that they would be entitled to part of this sum at a later date. It also provided that any Class member who had not filed a timely proof of a claim form but had just reason to believe he may be entitled to receive an award of damages must write to the Court of his intention to appear at the fairness hearing September 25, 1995. That party was then required to appear and to explain his reason

for not filing a timely claim.

Mr. Tessier requested permission to file a late proof of claim form on September 8, 1995, almost five months after the filling deadline, contending that he had no notice of the litigation. *See Tessier #10.* At the fairness hearing, the Court denied Mr. Tessier's request from the bench without comment. Tessier appealed, and in a Summary Calendar *per curiam,* No. 95-31089, January 17, 1997, the Fifth Circuit remanded the proceeding to determine "whether reasonable effort would have included a search of any public records that contained Mr. Tessier's name and address." *Op. At p.7.*

II

On remand, this Court conducted on evidently hearing, After listing to three hours of testimony including testimony from Mr. Tessier, *see Transcript, Hearing April 1, 1997 p. 138-169*, the court has difficulty giving credence to Mr. Tessier's contention that he did not know of the litigation.

Credibility assessments are made by the trial court and once made are accorded great deference. *Dardar v. LaFourche Realty CO.*, 55 F.3rd 1082(5th Cir.1995). As is the case with most class actions, the case at bar has its own peculiar

characteristics. In this case, the length of the alleged harm, the Class definition, and the timing of this particular litigation highlighted the enormity, and difficulty, of this case from its inception. It was the talk of the community in 1986, and today the word Combustion invokes conversation familiar to many sectors of the Baton Rouge and Livingston Parish communities.

The alleged injuries and property damages occurred over a period of 30 years. As a result, the Class definition of the entire parish included any resident of the parish at any time beginning in the early 1960s and extending to 1994. The transient nature of the Livingston Parish residents complicated any effort to finitely identify the class members. In many instance, relatives remaining in the parish were the best source of location potential claimants who had moved away. From the outset, one strategy followed by the PSC was the use of personal communications, word of mouth, to locate Class members.

Prior to Class certification, potential plaintiffs were notified of the law suit through public meetings held at schools and other places near the site. Plaintiffs' attorneys were interviewed on Baton Rouge television and "dozens of times"

by the Baton Rouge and Denham Springs newspapers. *Transcript April 1, 1997 hearing, testimony of Mr. Pardue p.36-42*. In addition to the official notices, stories were featured in the Baton Rouge Morning Advocate, the Baton Rouge State Times, the Livingston Times, and the Denham Springs News. All papers enjoyed parish-wide circulation. Id. *See also Plaintiffs' Exhibit 16*(collection of newspaper articles in all area papers about the site).

One of the regular news features in the Baton Rouge Advocate business section is entitled "Florida Parishes" and covers newsworthy event in Livingston Parish. The list below is a sample

Of the coverage afforded the *Combustion* site and law suit in the Baton Rouge newspaper:

1986 – six in August through year end
1988 – three in June and one in July
1990 – four throughout the month of December
1991 – one in March, six in April, two in May
1992 – two in February, three in March, two in April, one each in May and June, two each in July and October, one in November
1993 – three in March, one each in June and October
1995 – one in July

The PSC opened claims offices in 1990 on major thoroughfares in the city of Denham Springs, the site

community. A large sign, "Combustion Claims Office," was erected beside one office located in a large shopping center. There were three claims offices, and at times two were opened simultaneously, often six days per week. Potential plaintiffs were encouraged to call and give their names and addresses to the staff at the office and also names and addresses of friends and relatives who may have claims to assert. In fact, the gentleman who helped Mr. Tessier collect rent, Mr. Arthur Eby, signed up at the claims office on July 22,1992. These names and addresses were entered on computer and formed the base for Class communications throughout the process. Twelve thousand potential claimants called or came to the offices to complete questionnaires, the precursor of the proof of claim form.

In addition, the issue of contamination by toxic chemicals was not inconsequential for Livingston Parish, nor was it novel. By 1986, the State regulatory authorities were heavily involved with monitoring the Combustion site. The Unites States Environmental Protection Agency declared it a Superfund site at a time when national media and political attention focused on such designated areas. Just prior to the

filing of the law suit, Livingston Parish was the location of a horrendous accident resulting form a train derailment, where toxins being carried in rail cars spewed on the town of Livingston. Homes were evacuated for weeks, and the water supply was poisoned. It is fair to conclude that the awareness of the dangers of chemical toxins was keenly in the minds and on the tongues of the residents of Livingston Parish. Testimony of putative class members at the September 25, 1995 fairness hearing was that "everyone was talking about It." *Transcript of fairness hearing , September 25, 1995, Mr. Peake, p.96.*

Mr. Tessier has shown that he is an alert and astute business man. It is not disputed that he is the owner of two contiguous parcels of land within 1/4 mile of the site. In fact, Mr. Tessier and his wife rented a house on that land for four or five years until 1981, prior to his purchase of the property. These years are commonly referred to as the "hottest" years of activity at the site. In 1981, after the site had blown up again, his wife insisted and they moved to Baton Rouge, about 15 miles west of the site. They have lived at that same residence since that

time.

It was in 1982 and 1983, when the site closed because of financial and regulatory complications, that Mr. Tessier purchased the very property he had rented, and more – about 100 acres totally. These two parcels of land form the basis of his claim. From that time forward, Mr. Tessier has maintained a rental business with the houses and trailers he installed in between the houses. He has approximately 20 units.

As to be expected, Mr. Tessier's testimony verified that he is and has been familiar with the activities at the site. He knew that Earl Dubose has sold the site and moved to Florida. He was well aware of the condition of the site before he had moved, of its volatility, smell, and location of the waste pits. He was also aware of that the site had been cleaned up in the 1980s because he noticed the changes when he made trips out to check on his property and collect rent from Mr. Eby. He knew that the main entrance road, the same road on which he had lived, had been resurfaced in the 1980s, that the skull and cross-bones signs had been posted at that time along the entrance road indicating the extreme danger of the site.

Mr. Tessier is an educated businessman. He has a degree

in accounting from Louisiana State University. He testified that he reads the Baton Rouge Advocate daily, including the business section. He even admits that he may have read articles about the law suit, but that it did not "ring a bell." While he may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit.

This Court shall again deny Mr. Patrick Tessier permission to complete a late proof of claim form.

THUS DONE AND SIGNED this 13th day of June, 1997.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DIVISION OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.

U.S. District Court
Western Division of Louisiana
Filed
June 13, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

* CIVIL ACTION NO. 94MDL4000

* ALL CASES

* JUDGE RICHARD T. HAIK

****

ORDER

****

CONSIDERING the forgoing Ruling,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the request by Patrick Tessier to complete a late proof of claim form is DENIED.

THUS DONE AND SIGNED this 13th day of June, 1997.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
Filed
Nov. 20, 1998
Charles R. Fulbruge III
Clerk

No. 97-30822

In Re: COMBUSTION, INC.

PLAINTIFFS' STEERING COMMITTEE

Plaintiff – Appellee

v.

PATRICK L. TESSIER

Movant – Appellant

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

Henry A. Politz

Chief Judge

UNITED STATES COURT OF APPEALS

for the Fifth Circuit

U.S. Court of Appeals
Filed
Nov 13, 1998
Charles R. Fulbruge III
Clerk

No. 95-31073
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE
Plaintiffs-Appellees,

VERSUS

JOHN H. DAY, JR.; FRANKIE S. DAY; JOHN ALAN DAY;.
DAVID MARK DAY; SHARON DAY HULGAN; WENDI S. DAY; AND
MARTIE S. HUTCHINSON
Movants-Appellants

******

No. 95-31089
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE,
Plaintiffs-Appellees

VERSUS

PATRICK L. TESSIER,
Movant-Appellant.

******

No. 96-30208
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE,

Plaintiff-Appellee

VERSUS

DIANE P. COGLEY JOHNSON,

Movant-Appellant.

******

No. 96-30210
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE

Plaintiffs-Appellees

VERSUS

JOHN J. COGLEY, SR.; JOHN J. COGLEY, JR.,

Movants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana
(94-MD-4000)

Before DAVIS, EMILIO M. GARZA, and STEWART,
Circuit Judges.

PER CURIAM:[1]

John J. Day, Jr., Patrick L. Tessier, Diane P. Cogley Johnson, and John J. Cogley, Jr., all appeal the district court's denial of their requests for permission to file late proof of claims and be included among the plaintiff class in this case. We affirm the orders appealed by Mr. Day, Mr. Cogley and Mrs. Johnson. With regard to Mr. Tessier's appeal, we vacate the district court's order and remand for further proceedings.

I.

The above appeals all arise out of a mass disaster toxic tort class action involving a hazardous waste dump site located in Livingston Parish, Louisiana. The site served as a oil recycling facility until 1980. It is now the Combustion, Inc. Superfund site. The class contends that the defendants named in the action are responsible for numerous damages including

serious illnesses suffered by those exposed to the toxic chemicals and also damage to the property exposed to those chemicals.

In 1991, the Combustion site class was certified by the state district court. That same year, the same court ordered notice of the class and the right to opt out of it be disseminated by mail to the last known address of all class members and published in the local newspapers. The deadline for opting out of the class was set for May 1993. In 1993, the action was removed to federal district court.

In July 1994, the district court ordered all putative class members to file proof of claim by December 31, 1994. The forms were intended to assist the district court in claims evaluation and trial preparation. The notice advised the putative class members that failure to meet this deadline constituted waiver of any right to participate in the litigation. This notice was also disseminated by mail to last known address of all class members and published in both local papers.

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[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

By December 31, over 13,000 claimants had filed their proof of claim forms. In July of 1995 the district court approved a preliminary settlement agreement between the class and some of the defendants. The court ordered a September 1995 fairness hearing be held to consider the preliminary settlement. The court further ordered that all class members who had failed to timely file a proof of claim notify the court in writing of their intention to appear at the fairness hearing and show good cause for why they should be allowed to file a late proof of claim and take part in the litigation. Appellants all appeared at the hearing and were given an opportunity to justify their late filing. The district court denied all of the appellants' requests to file late claims and these appeal followed.

I.

A.

Johnson and Cogley argue that they were misled by the notice informing them of the need to file a proof of claim. They argue that they reasonably interpreted the notice as limiting eligible filers to current property owners or residents of Livingston Parish. The order is clearly not so limited and the district court correctly rejected this argument.

As to Mr. Day, [2] he argues that he did not timely file because he feared retaliation by his employer. He produced no evidence tending to substantiate his fear and the district court was entitled to reject this excuse as good cause to file a late proof of claim. We have considered the other arguments made by Mr. Day, and find them meritless.

B.

We now turn to Mr. Tessier's appeal. In response to the district court's order regarding late proof of claims requests, Mr. Tessier informed the district court by letter that he is a land owner who qualifies as a class member[3] and that he had not received any notification of the suit until contacted after the December deadline by an appraiser hired by one of the plaintiff attorneys:

> Despite the fact that for more than 20 years I have owned over 100 acres of land less than one-quarter mile downstream from the pollution source, no personal notice was sent to me regarding this lawsuit. I understand that notice was given in the newspapers, but I have not seen any notice in the Advocate. I do not read any newspapers from Livingston Parish.

Mr. Tessier also attached a map of Livingston Parish that shows the location of his property in relation to the Superfund site. The court acknowledged receipt of this letter and instructed Mr. Tessier to appear before the court on September 27, 1995.

At the hearing, Mr. Tessier stated that "his name and address are readily ascertainable and [that] due process requires personal notice when addresses are readily ascertainable through the public records." The court disagreed without discussion and issued an order dismissing the request and stating "this Court found that notice was reasonable and adequate in compliance with due process requirements..."

Federal Rule of Civil Procedure 23 (c) (2) provides "[i]n any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort..." Fed. R. Civ. P. 23 (c) (2). In Eisen v. Charlisle & Jacquelin, the Supreme Court held "the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses are ascertained through reasonable effort."

Eisen, 471 U.S. at 173; See also In re Nissan Motor Corp. Antitrust Litigation, 552 F. 2d 1088, 1097 (5th Cir. 1977) (stating that publication is not a substitute for personal notice if the individual's name and address were ascertainable through reasonable efforts).

Mr. Tessier argues that his name and address were readily discernable from the public records of Livingston Parish. If reasonable effort would have uncovered his name and address, Mr. Tessier did not receive the personal notification to which he is entitled. Moreover, if he did not receive personal notification to which he is entitled, this amounts to good cause for not filing a timely proof of claim.

---

[2] Day's brief lists seven members of the Day family as appellants. However, we treat the brief submitted only on behalf of John H. Day, Jr. because only John, Jr. signed the brief. Parties appearing pro se must sign the documents they file. See Local Rule 28.6; Robinson v. National Cash Register Co., 808 F. 2d 1119, 1128 (5th Cir. 1987) (stating "a party appearing pro se must sign the document he files").

[3] Class members include "all persons or entities who or which own real estate or personal property and/or live and/or operate places of business... in Livingston Parish, Louisiana..."

Because it is not clear from the district court's order that the Eisen standard was applied or whether reasonable effort would have uncovered Mr. Tessier's name and address, we remand this case to the district court to make such a determination and for further proceedings. Specifically, the district court's inquiry should be whether reasonable effort would have included a search of any public records that contain Mr. Tessier's name and address. If so, Mr. Tessier should be permitted to file a late proof of claim and take part in the litigation.

III.

For the reasons stated above, we affirm the district court's order denying Mr. Johnson, Mrs. Cogley and Mr. Day's requests to file late claims. However we vacate the order denying Mr. Tessier's request and remand this case to the district court for further proceedings.

AFFIRMED, VACATED and REMANDED.

UNITED STATES DISTRICT COURT

WESTERN DIVISION OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.

ACTION NO. 94MDL4000

U.S. District Court
Western Division of Louisiana
Filed
Sep 27, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

ALL CASES

JUDGE HAIK

MAGISTRATE JUDGE TYNES

JUDGMENT

This court finds that the Plaintiffs' Steering Committee, in accordance with the instructions of this Court, issued sufficient notice to the members of the plaintiff class herein of the requirement to complete a Proof of Claim in a timely manner. This court also finds that the Claimant did not comply with said requirement and has not shown good cause for such failure. In consideration hereof,

IT IS HEREBY ORDERED AND ADJUDGED that the claims of

Patrick Tessier

be and are DISMISSED WITH PREJUDICE for failure to comply with procedures established by this Court pursuant to

Fed. R. Civ. Pro 23 (d) (2) for asserting a claim for damages herein.

Lafayette, Louisiana, this 27th day of September 1995.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 22 1999
CLERK

No. 98-1333

In The

Supreme Court of the United States

October Term, 1998

PATRICK L. TESSIER,

Petitioner,

v.

COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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119 pp

QUESTION PRESENTED FOR REVIEW

The question presented for review is merely a credibility issue on a finding of fact.

PARTIES TO THE PROCEEDING

The parties of interest to this petition are the petitioner, Patrick L. Tessier, and the Plaintiffs' Steering Committee, through Calvin C. Fayard, Jr., Liaison Counsel, on behalf of the Class.

THE PLAINTIFFS' STEERING COMMITTEE
519 Florida Boulevard
Denham Springs, La.
(504) 664-4193. Members:

Calvin C. Fayard, Jr.
Frank Edwards
Hobart O. Pardue
Richard P. Reina
David W. Robinson
W. Hugh Sibley
Lewis O. Unglesby
Raymond C. Vinet, Sr.
Bob F. Wright
Wendell Gauthier

THE CLASS REPRESENTATIVES

Billie Stevens Picou
Shirley Breard
Flo Barker
Ellen Truax
Ashford Impson
Marie Rhodes
Glenn McCrory
Richard Nettles
Charles Tigner
Ray Johnson
Rhonda Morgan
John Comeaux

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STATEMENT OF JURISDICTION

Respondent does not question this Court's jurisdiction as to Mr. Tessier's present individual application for writs, but not to the extent urged on page 25 of his brief filed in the Court of Appeals [A. 1a], which is an obvious and impermissible attempt to parlay this appeal into a lucrative collateral proceeding on behalf of the Class, as hinted on page 10 of the Petition in this Court ("Neither Mr. Tessier, nor thousands upon thousands of class members. . . . were given legally sufficient notices of the pendency of the class action."). *Swint v. Chambers County Comm.*, 115 S. Ct. 1203, 1211; 514 U.S. 35, 47; 131 L.Ed.2d 60 (1995).

Simply put, this petition should only concern review of a ruling by the district court on remand, wherein the district court was initially directed as follows: "Specifically, the district court's inquiry should be whether reasonable effort would have included a search of any public records that contain *Mr. Tessier's* name and address. If so, *Mr. Tessier* should be permitted to file a late proof of claim and take part in the litigation." [Pet. App. 27a, emphasis added.]

The cited original proceeding in this Court was on Mr. Tessier's appeal from a final Rule 54(b) judgment which certified his *individual* prior dismissal, denying his application to file a late proof of claim. His second appeal, now before this Court, is from the denial of the district court, on the directed remand, of Mr. Tessier's right to file a proof of claim under the circumstances of *his particular case*. In *McKnight v. Blanchard*, 667 F.2d 477 (5th Cir.1982), the Court stated:

> "Even where an interlocutory order such as an injunction has been properly appealed and other incidental orders or questions non-reviewable are sought to be reviewed, it must be remembered that the appellate court will usually review only that part of the order which relates to the injunctive relief afforded *and only those*

questions basic to and underlying the specific order which supports the appeal." [Emphasis supplied.] 667 F.2d at 480-81:

To the extent that Mr. Tessier now seeks to collaterally attack the propriety of notice as to others than himself, *i.e.*, a class-wide attack on behalf of the Class, Mr. Tessier lacks requisite standing, *Loran v. Farr's/Bishops, Inc., et al.*, 988 F.2d 554 (5th Cir.1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir.1988). Also, there would be no jurisdictional basis for appeal of such issues under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.C. 1221, 93 L.Ed. 1528 (1949). *Bennett v. Bearing Corp.*, 629 F.2d 393 (5th Cir.1980); *In re: Corrugated Container Antitrust Litigation*, 611 F.2d 86 (5th Cir.1980).

In summary, this Court's jurisdiction should extend only to review of the Court of Appeal's affirmance of the ruling of the district court solely with regard to Mr. Tessier and not to the Class as a whole, since the factual circumstances as to that specific inquiry was the sole basis for the decisions of the courts below.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

As reflected in the district court's ruling on remand, notices of class certification and subsequent orders to file proofs of claim, were mailed to all known class members whose names and addresses had been identified through reasonable effort under the peculiar circumstances of the case, and were also repeatedly published in the newspaper to which petitioner subscribed and regularly read. As further found by the district court, this notification procedure constituted the best notice practicable under the circumstances and thus complied with the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure.

Although these notices were not personally addressed to Mr. Tessier (Petitioner), an absent landlord whose name and address were not easily ascertainable,

and although he denied any knowledge of the class action during its pendency for nine years, Mr. Tessier, who voluntarily took the stand in the course of the hearing and thereby placed his credibility at issue, convinced the district court that he had sufficient actual knowledge of the class action and the proceedings therein during all relevant times. This conclusion and other facts testified to by Mr. Tessier, as reflected in the district court's ruling, justified the district court's rejection of Mr. Tessier's request to file a late proof of claim for lack of credibility. On the basis of its review of the entire record and briefs, the United States Fifth Circuit Court of Appeals summarily affirmed the district court's factual judgment. Accordingly, Mr. Tessier's petition from a factbound ruling should be denied.

STATEMENT OF RELEVANT ISSUES

I. Whether actual knowledge by the only claimant before the Court makes issues of the adequacy of procedures aimed at achieving such knowledge immaterial.

A. Whether procedures aimed at notifying class members are to be treated as an end in themselves, or whether they are merely a means to the end of achieving actual notice to claimants.

B. Whether attacks on procedures aimed at notifying class members may be used as an excuse for failure to make a claim by a person who had actual notice, where such person is the only claimant before the Court and has no standing to represent a class which has already approved settlements and received its settlement proceeds.

C. Whether credibility is always an issue when a litigant takes the witness stand and gives testimony in support of his claim that is not independently corroborated.

II. Whether the District Court committed clear error in finding as a fact that Mr. Tessier's claim that he was unaware of the existence of the nine year old class action was not credible.

III. Whether the method of dissemination of the notice of class certification, originally issued in state court, complied with FRCP 23(c)(2) and FRCP Rule 23(c)(3) with regard to class actions maintainable under FRCP Rule 23(b)(3).

IV. Whether reasonable effort would have included a search of the public records that contain Mr. Tessier's name and address.

V. Whether once a putative class member receives actual notice of the pendency of a class action suit, he has any responsibilities to look into the matter, to follow orders of the court, or to assist counsel to protect his rights, or whether he may "sideline" on the theory that he has not received "legal notice" addressed to him individually.

STATEMENT OF THE CASE

1. Proceedings in the Court Below.

The district court in its "Ruling" on Mr. Tessier's request to be exempted from the deadline set forth an accurate summary of the case as it relates to this issue [Pet. App. 5a-15a], except for one important omission, discussed below and reflected in respondents' Appendix 3a. Supplementing this summary, in order to bring the Court up to date, a total of six partial settlements between the Class and the defendants have been approved by properly certified FRCP Rule 54(b) judgments and all are now final, executory and all defendants, numbering in the hundreds, have been dismissed.[1] In

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[1] Five of these proceedings, as well as the history of this litigation, are discussed in detail in *In re: Combustion, Inc.*, 968 F.Supp. 673 (W.D.La.1997), and *In re: Combustion, Inc.*, 978 F.Supp. 673 (W.D.La.1997), *affirmed*, 159 F.3d 1356 (5th Cir.1998).

addition, the Settlement Fund generated by these settlements has been disbursed to class members, although a portion of the Claimant's Fund has been reserved until completion of any pending appeals.

2. Statements of Misrepresentations in the Petition.

Mr. Tessier's petition is replete with misrepresentations and omissions in an effort to present solely an issue of law. To the contrary, the decision of the district court was based on a plethora of facts supported by the evidence, which requires respondents to present these facts to the Court pursuant to Rule 15.2, supported by an appendix, in order for the Court to understand the basis for the decisions of the courts below. As for misstatements of fact, on page 3 of the petition, Mr. Tessier alleges that the PSC "never gave Mr. Tessier actual notice by mail *or any other means of the pendency of the class action.*" [Emphasis supplied.] On page 5 of the petition, Mr. Tessier stated "he did not know the class action was pending." On page 9 of his petition, Mr. Tessier stated that there was no evidence submitted at the hearing on remand that Mr. Tessier "knew he had any rights or any other involvement in any way with the *In re: Combustion, Inc.*, class action," and on page 10 that "there is not a scintilla of evidence proving Mr. Tessier knew anything about the *In re: Combustion, Inc.*, class action other than, possibly, that it was pending." These statements are incorrect and misleading, as will be shown below.

Further, on page 3 of the petition, and again at page 6, Mr. Tessier represents as a fact that no class member was sent or received notice unless he or she contacted the PSC first. These statements are not only incorrect but

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The sixth and final partial settlement was approved following a fairness hearing pursuant to FRCP. Rule 23(e) on December 9, 1997, a final FRCP Rule 54(b) judgment having been entered on December 18, 1997, from which no appeal was taken.

raise the implication that the members of the Committee did not attempt to contact any potential class members by word of mouth, newsletter, dissemination of official notices, or otherwise. The district court's opinion clearly refutes this statement, as documented in the record and discussed below.

Finally, at page 10 of the petition, Mr. Tessier misrepresents that "thousands upon thousands of class members were not given legally sufficient notice of the pendency of the class action." This statement has no basis in fact and the record on appeal is to the contrary. Petitioner may have based this misrepresentation on the assumption that all or a large majority of the class members did not respond, since the class territory included the entire Parish of Livingston, whereas the affected area was in the immediate vicinity of the Site and putative class members beyond that area would have suffered no damages to support a proof of claim, and therefore no justifiable reason to come forward and respond.

3. Statement of Facts.

This class action was originally filed in 1986. After a series of removals and remands to and from federal court, consuming a period of four years, a class certification hearing was conducted in state court. After a state court appeal,[2] the class territory was simply stated to be the Parish of Livingston, although the actual site is close to East Baton Rouge Parish and considered a part of Metropolitan Baton Rouge, and is 30 miles from the opposite boundary of Livingston Parish. [A. 27a-28a]

The activities of the Plaintiffs' Steering Committee (PSC) and its efforts to identify all potential claimants, from the time the action was originally filed until the

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[2] *Livingston Parish Police Jury, et al. v. Acadiana Shipyard, et al.*, 598 So.2d 1177 (La.App. 2 Cir.1992), *writ denied*, 605 So.2d 1122 (La. 1992).

time had expired to file a proof of claim, are particularized in the *Summary of PSC Operations.* [A. 4a-14a, Exh. 7, 16a] As reflected in the *Summary of PSC Operations,* and in the testimony of Terri Duhon, the *Important Notice of Class Action* was issued by the state court in March, 1993, six years after the class action was filed. In accordance with the court's order, *the notice was sent by first class mail to 7,083 known claimants at their last known addresses* [A. 18a] and published two times in each of the Denham Springs newspaper and THE ADVOCATE, the Baton Rouge newspaper. [A. 8a] The notice specifically warned that proof of claim proceedings would follow and that all persons who met the class definition, and did not exclude themselves as provided therein, would be subject to and bound by all orders of the court regarding the procedure for completing a proof of claim.

Following the dissemination of this notice, and before any notice was issued to file proofs of claim, an additional 812 claimants had given notice of their intent to file a claim, bringing the total to 7,895 claimants. [A. 18a-19a]

During the course of this notice process, and in April, 1993, this class action was again removed to Federal Court. On July 11, 1994, the district court ordered the PSC to disseminate the *Important Notice to All Class Members [to submit a proof of claim].* The notice warned that a failure to submit a timely proof of claim would be deemed a waiver of their rights to recover in the class action.

On July 31, 1994, in accordance with orders of the district court, the PSC mailed the *Important Notice to All Class Members [to file a proof of claim]* along with a letter to the last known address of 7,895 class members [A. 18a-19a] and also caused this notice be published twice in each of THE DENHAM SPRINGS/LIVINGSTON PARISH NEWS and the official Louisiana state-wide publication, THE ADVOCATE on July 24 and 25, 1994, respectively. [A. 10a]

On November 24, 1994, the PSC again mailed the same notice to known class members who had not yet

completed a proof of claim. In similar compliance with a court order, the PSC caused the notice to be published in THE DENHAM SPRINGS LIVINGSTON PARISH NEWS on November 24, and December 1, 1994 and also in THE ADVOCATE on the same dates. [A. 11a] The notice reiterated the definition of who was included in the class [Pet. App. 6a-7a] and provided detailed instructions as to how and where to complete and file a proof of claim.

To accommodate the class, in mid summer of 1994 the PSC set up claims offices staffed in both Springfield and Denham Springs, Louisiana, to assist class members in the completion of their proofs of claim. Besides these offices (both of which were on the thoroughfares in the very community from which the claims asserted in this class action arise) for the purpose of assisting the class to timely complete the proofs of claim, the PSC conducted telephone interviews and traveled to locations where necessary. [A. 9a-10a]

By December 31, 1994, some 12,957 individuals had given notice of an intent to complete proofs of claim, including thousands of these individuals who had already done so. [A. 19a-20a]

The district court extended the actual deadline to complete a proof of claim to April 11, 1995. In sum, by April 11, 1995, the claims offices had taken a total of 9,934 claim forms. [A. 19a]

On August 10, 1995, two notices ordered by the court, including the *Important Notice to All Class Members Regarding Partial Settlement* and the *Order Regarding Proofs of Claim* were disseminated by first class mail to 9,934 class members who had filed proofs of claim and to 3,023 persons who had responded but who had not filed a proof of claim. [A. 19a-20a] This notice was likewise published, as ordered in the same newspapers, including THE ADVOCATE on August 10 and August 24, 1995. [A. 13a] The *Order Regarding Proofs of Claim* was included within the notice, informing class members who had not filed a timely proof of claim that they would be allowed a hearing contemporaneous with the settlement hearing to

show cause why they should be allowed to file a late proof of claim.

As found by the district court, Mr. Tessier was not among the 12,957 who had responded to the varied publicity to express an interest in the class action suit in the nine years it had been pending, even though he was very familiar with the polluted site, had lived within 1,000 feet of it on the same road, had moved away because the site blew up on a regular basis, owned numerous rental properties in the same area, and had read at least newspaper stories about the class action suit [Pet. App. 11a-14a]. When an appraiser working for the PSC called him in April, 1995, for permission to enter his property to work up evidence of property devaluation around the Combustion site, Mr. Tessier said he was not part of the class action, and he did not need them to look at his property. [A. 45a-50a] Shortly after an $80 million partial settlement was announced by the notice in August, 1995, Mr. Tessier filed a request for exemption from the proof of claim deadline to make a claim for property damages only – no injury claim [Pet. 12, fn. 2].

SUMMARY OF ARGUMENT

Where notice to only one claimant is at issue, arguments about the adequacy of efforts to notify other persons are no longer material where the particular claimant did in fact receive actual knowledge. There was credible evidence that Mr. Tessier did, in fact, know about the class action and how it was proceeding, but elected not to participate until he could discern how it was going to come out, one month after an $80 million partial settlement was announced by notice nine years after the filing of the class action. There was no abuse of district judge's discretion in finding Mr. Tessier had actual and timely notice of the class action.

ARGUMENT

I. When the notification methods used result in Actual Knowledge of a claimant (the only claimant before the Court), questions of whether a personal letter should have been sent to him or other class members are rendered superfluous and immaterial.

Mr. Tessier's brief over and over sounds the theme that under the law it does not matter whether he had actual knowledge or constructive knowledge.[3] He repeatedly argues that he may still use the fact that a personal letter ("legal notice" the Petition calls it) was not sent to him as an absentee landlord as a basis for exemption from the court ordered deadline for submitting a claim. Because he found out through means other than a personal letter, he now claims that special exemption should be given to him so that he can share in a settlement amount that had been negotiated with the defendants based on the number of claim forms that had been filed **before** the Court's deadline and extension.

This is not the law, and could not be in a rational system. The only issue before the Court is notice to Mr. Tessier. Although Mr. Tessier's appeals are an attempt to parlay his claim into a new, larger claim on behalf of all the persons who never came forward to make a claim, he does not represent the class, and has no standing to do so. *Loran v. Farr's/Bishops, Inc., et al*, 988 F.2d 554 (5th Cir.1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir.1988). The order appealed did nothing with respect to any member of the class except Mr. Tessier. Therefore, arguments about what notification efforts are required under *Eisen IV*[4] in order to be reasonably calculated to

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[3] This is in direct contradiction to what Mr. Tessier's counsel advocated at the hearing, when he stated: "The issue here is when Mr. Tessier knew or should have known". [A. 48a]

[4] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 732 (1974).

apprise members of a class, as opposed to this one claimant's notification, are not relevant.

The only issue here is what was reasonable and fair to Mr. Tessier, given his circumstances and the Plaintiffs' Steering Committee's circumstances. Mr. Tessier had only himself and his claim to worry about. The PSC had thousands of people to deal with, not only those in place at the time, but those who had contact with any or all parts of the parish for any part of 30 years, whether by residence, work, or school.

The efforts of the PSC at notification that Mr. Tessier criticizes as inadequate are only means to an end; they are not ends in themselves. If these efforts resulted in Mr. Tessier being actually apprised, then the adequacy of the efforts are not important. Likewise, if Mr. Tessier became apprised independently of six official court notices published in THE ADVOCATE, the numerous PSC's television and newspaper interviews and notices, roadway sign, claims offices, the thousands of letters and newsletters it sent out, then the adequacy of the efforts are again not important. If Mr. Tessier was apprised anyway, then there is no causal link between his criticisms of the notification efforts and his waiting until nine years into the litigation, when an $80 million settlement was announced in August, 1995 to come forward with his claim in September, 1995. If he knew, his reasons for not coming forward sooner must have been something other than lack of knowledge.

The rulings of both the district court and the court of appeal turned on a factual question, and yet the Petition never addresses the factual evidence from the hearing. Mr. Tessier does not claim in this Court that the district court clearly erred on the factual question of whether he had actual knowledge of the pendency of the class action (and therefore had some other reason for not coming forward for nine years). Nor does he argue clear error as to the finding that his testimony was not credible.

Mr. Tessier claimed in his appeal to the Court of Appeals that credibility may never be a basis for deciding

whether a claimant should be excused from delaying past a claim deadline, past an extension, and beyond the time at which a settlement (negotiated on the basis of the claims made before the deadline) is announced. But Mr. Tessier found it necessary to take the witness stand and to give testimony in support of his claim. He made some statements under oath that the district court found to have been incredible, *i.e.*, that he had no knowledge whatsoever that the class action even existed during nine years of its existence from 1986 to July, 1995. [A. 65a, 68a-69a]

In this Court, Mr. Tessier has shifted his position, and now argues that although it may be true that, contrary to his sworn testimony, he was aware of the pendency of the class action, the courts must accept as truthful other aspects of his testimony, such as that he did not realize that the suit applied to him, that he had a right to opt-out, or to intervene, etc. (Mr. Tessier has not requested to opt-out, or to intervene.) Yet the district court's factual finding was supported by evidence on these questions as well, including the following: Mr. Tessier subscribed to and regularly read THE ADVOCATE, the Baton Rouge newspaper, where this information was published in formal notices a total of six times in March and April, 1993, July, 1993, November, 1993 and December, 1994. [A. 8a, 10a-11a]; Mr. Tessier's level of education and sophistication was far above the average of the over 9,900 persons who were apprised and came forward as a result of the same publicity generated by the PSC; Mr. Tessier's tenant and rent collector, Mr. Eby, was aware of the pertinent information and filed a timely proof of claim; Mr. Tessier went to the area, within 1,000 feet of the site regularly to receive the rent from his 20 rental units on his property; numerous newspaper articles in THE ADVOCATE that kept the polluted site and the suit prominent in the news; and the tremendous word-of-mouth resulting from having over 9,900 claimants in such a small community [Pet. App. 7a-15a].

Mr. Tessier took the stand, which he did not have to do. Once he did so, the Court's duty was to consider all the evidence, including the testimony of Mr. Tessier. He did not testify that he knew of the suit, but did not know of the need to file a claim form. Instead, he stated under oath that he had no knowledge whatsoever of the class action suit. [A. 65a, 68a-69a] If the totality of the evidence and circumstantial evidence convinced the Court that this testimony was not true, and that Mr. Tessier's failure to file his claim form before the deadline was not because of lack of knowledge, but because he had other reasons, or simply that he slept on his rights, then the court was correct in not allowing his participation in the settlement proceeds. In other words, the damaging of his own credibility by Mr. Tessier's testimony has consequences that go beyond his eventual begrudging admission that he may have been aware of the class action suit [A. 71a-72a], but "it did not ring a large bell." [A. 72a] His false claims of complete ignorance at both his first and second hearings, shown to be untrue at the second hearing, cast doubt on his present "fall-back" assertions that his knowledge of the suit did not include that "he might have an interest in the class litigation," or that "he could enter an appearance" or "that he had any rights or any involvement in any way." [Pet. 9].

Consider the results if it were the law that actual knowledge of the proceedings were immaterial. In such case, anyone, even an attorney on the Plaintiffs's Steering Committee, could wait to see how the case came out, whether a settlement was reached and for how much, and then decided to file a proof of claim on his own behalf, saying he did not receive a letter addressed to him apprising him. A class representative could do the same thing. That would be absurd.

Proof that the late-coming claimant had actual or constructive knowledge must always be a barrier to those seeking to upset or join in settlements made by other claimants. Otherwise the practice of "side-lining" would be rewarded. Before sub-section (c)(3) was added to Rule

23, there was no penalty provided if the class members took no action upon receipt of a (b)(3) notice. As a result the practice of "sidelining" or "one-way intervention" developed, where "a potential class member will seek to refrain from participating in a class action until the outcome, whether favorable or unfavorable, appears discernible. If a favorable outcome is likely, the class members will attempt to intervene; if the outcome will be unfavorable, the member will remain on the sidelines to avoid the *res judicata* effect of the judgment." NEWBERG ON CLASS ACTIONS, THIRD EDITION, § 8.10, citing *Rules Advisory Committee Notes to Fed. R. Civ. P.*, 39 F.D. 69, 106 (1966). See, also, *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 663 (5th Cir.1976) Consequently, when Rule 23(c)(3) was added in 1966, to provide that in (b)(3) class actions the judgment in the class action would bind putative class members who did not timely exclude themselves from the class action, one of its purposes was to prevent the practice of "sidelining.".

Mr. Tessier cites no case holding that a particular claimant who had actual knowledge was granted relief because he did not receive a letter addressed personally to him.

Langford v Devitt, 127 F.R.D. 41 (S.D.N.Y. 1989), is essentially on-point, and holds that actual or constructive knowledge by a putative class member renders immaterial the fact that he was not sent a notice regarding a class action certification and settlement.

> "This requirement does not mandate that each and every class member receive notice in the specific form ordered by the court. Rather, the precise content and method of notice to class members is not significant if the goal – notice of the pendency of the lawsuit – is met. . . . "
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> . . . "the Pension Plan, aware from communications with opposing counsel that this action was certified as a class action, is not justified in now

complaining that formal notice was never received. Although the Pension Plan was under no duty to investigate the lack of notice of such certification, it cannot now rely on its own inaction to justify late exclusion." 127 F.R.D. at 44-45.

II. The District Court did not commit clear error in finding as a fact that Mr. Tessier's claim that he was unaware of the existence of the nine year old class action suit was not credible.

Although Mr. Tessier testified under oath that he knew *nothing whatsoever* of the class action lawsuit until July, 1995 [A. 66a-67a], he claimed that he sprung into action at that time, and called an attorney on the Plaintiff's Steering Committee. However, he did not send a request to file a request to file a late proof of claim until September, 1995, after the notice of the $80 million dollar partial settlement was published in August. [A. 13a]

In addition to the official published notices in THE ADVOCATE, there were offered into evidence 43 stories about the class action suit in the Baton Rouge newspaper that were published before the time Mr. Tessier claims he first heard of it. They are listed by year in the Court's ruling on page 11a of the petitioner's appendix. Mr. Tessier, on cross-examination, admitted that he subscribed to THE ADVOCATE, the Baton Rouge newspaper. [A. 71a] When shown the stack of articles about the suit, he stated: "Obviously, there are a lot of articles there. I read the paper." [A. 75a] He acknowledged he may have read the articles [A. 72a, 75a], but stated, "It didn't ring a large bell."[5] [A. 72a] In other words, he saw, but he did not care.

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[5] The Petition contains as an appendix the district court's written opinion, with what is presented to be a stamp of the document by the clerk of court. However, it is actually a retyped version with a computer-contrived reproduction of the clerk's stamp, and with a significant substantive error or inaccuracy.

These articles did not "ring a large bell" to Mr. Tessier, even though: (1) He owned 100 acres of land only 1,000 feet from the site, and had from 9 to 25 rental units on the property at various points in this time frame. [A. 79a]; (2) before he bought the property, he had lived within 1,000 feet of the Combustion site for years, and had moved away because it blew up on a regular basis [A. 62a, 67a, 68a-69a]; he was familiar with where they did the "cooking" on the property; he knew that a creek on his property drained the Combustion site; he had seen a big white sign on the road with skull and cross bones, indicating a hazardous waste area since it was put up, and had seen the cleanup going on at the site [A. 73a, 74a, 76a]; after moving to Baton Rouge, he still went out to his property to see how it was doing, and to receive the rent from Mr. Eby, who collected for him from the tenants [A. 78a-79a]; Mr. Eby filed his own proof of claim timely, on July 22, 1992 (three years before Mr. Tessier claims he first heard of this) [Pet. App. 12a based on the record of the case]; Mr. Tessier has business and accounting college degrees. [A. 76a] Certainly these circumstances would have made any of the 43 stories in the Baton Rouge newspaper "ring a large bell."

Mr. Tessier's testimony was directly contradicted by Mr. Dale Inman, a real estate appraiser working on the class action. Mr. Inman testified that in April, 1995, he called Mr. Tessier and told him that he was working for the Plaintiff's Steering Committee, and they were looking

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The Petitioner's reproduction shows the district court quoting Mr. Tessier's testimony as being that when he read the newspaper article about the class action, it "did not ring a bell." [Pet. App. 15a]. The district court's actual signed document quotes Mr. Tessier more accurately as saying the article "did not ring a **big** bell." [A. 3a] The transcript actually says reading the article "did not ring a **large** bell." [A. 72a] Leaving out the "big" or "large" before the "bell", is a crucial difference, analogous to changing his testimony to "I did not realize" from "I did not care."

at the properties around the Combustion site to determine if the property values were negatively impacted, and to ask permission to come onto Mr. Tessier's property. [A. 46a-47a, 50a] Mr. Tessier told him that he was not part of that class action, and he did not want them to look at his property. [A. 49a] Mr. Inman was definite that this was April, 1995, and not later. [A. 48a] Mr. Tessier denied that he had received any such phone call about inspecting or appraising the property, until he got a call in July, 1995, from a lady working in a law office (after the deadline and one month before the announcement of the $80 million settlement.) [A. 65a-66a] He denied he had ever refused permission or been reluctant to have his property inspected. [A. 67a] Thus, either Mr. Tessier or Mr. Inman was not telling the truth.

The testimony of Mr. Inman alone is sufficient to support the factual finding of the district court, not only as to Mr. Tessier's awareness of the class action suit, but also demonstrates that Mr. Tessier, contrary to his new "fall-back" position, was aware that it applied to him, that it meant devaluation of his property could be asserted by him in the suit if he chose, and that the committee was in the process of gathering evidence of property devaluations. Indeed, it shows that he had more than meaningful notice, he had available assistance from the committee to put together the evidence for the claim for devaluation of his property if he were interested, but he turned down the opportunity.

There were a number of inferences and conclusions that the district court, as the finder of fact, could reasonably have drawn based on the totality of the evidence at the hearing, including the following:

(1) Mr. Tessier's reasons for not coming forward with his claim until September, 1995 was not because he was without knowledge.

(2) Mr. Tessier did not believe that his own claim for property diminution in value had any merit that would stand up to discovery or trial on the merits until he read the case was settled.

The price he paid took into account his knowledge of the pollution, which was already terminated and was being cleaned-up at the time. Only after he heard that an $80 million dollar settlement had been reached did he decide that he would try to obtain part of it.

(3) In support of the above conclusion, the facts are: Mr. Tessier had bought the property in 1982 and 1983 [A. 68a-69a] after the Combustion site had been closed down and its polluted state was well-known and publicized. He was intimately aware of the pollution, because he lived for 5-6 years within 1,000 feet of it [A. 62a, 67a], and admitted that his wife made him move away because the site blew up on a regular basis. Yet, he bought the property after he moved to Baton Rouge. [A. 70a-71a, 74a][6] Thus, any diminution in value to the property would already have been discounted in the price that Mr. Tessier, an astute business man, and who knew the problem firsthand, had negotiated for the purchase.

(4) Mr. Tessier may well have believed that the large amount of rent he was to receive in his plan to increase his rental units on the property to 20-25 in 1995 would prevent him from proving in a trial that he had suffered financially from the pollution.

(5) Mr. Tessier may also have felt that his joining in and supporting the suit, and testifying at the trial, might be used against him if any or all of the tenants in his 20 rental units on the property should sue him for pollution on the rental

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[6] Mr. Tessier's knowledge that the property he moved off of was not safe because of the waste site within 1,000 feet did not prevent him from later increasing his rental units on the property to 20 by sticking trailers in the spaces between the houses and renting them to people. [A. 64a]

property. In Louisiana at the time in 1994-1995, an owner of land or buildings was strictly liable for a defective condition on the property that caused injury, even if the owner had not caused the condition and was unaware of it. La. Civil Code article 2317, 2322. Mr. Tessier's making a claim in the class action could be viewed as a judicial admission of such an injurious hazardous condition on the property he rented to these people.

(6) Mr. Tessier was paying taxes on the property on an assessment of only $2,950 applicable to unimproved land which would have increased substantially if assessed on the basis of the purchase price plus the improvements he made.[7] The Court may have reasonably inferred motive on Mr. Tessier's part to not come forward with the claim so as not to attract the attention that would surely cause his property taxes to substantially increase.

(7) Mr. Tessier testified that the permit office records reflected that he had not applied for any permits until May 10, 1995 (after the deadline). [A. 64a][8] Yet, he stated that he assumes he did apply for permits before that. [A. 64a] The Court may have inferred that Mr. Tessier did not come forward with the claim because he had erected rental units without the proper permits being obtained, a process which could have triggered

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[7] Art. 7. § 18(A) of the La. Const. of 1994 provides *ad valorem* taxes shall be imposed at a uniform rate (assessed valuation which shall be a percentage of the fair market value according to its classification). §§ B fixes this percentage in the case of land at 10% plus 10% for value of improvements for residential purposes.

[8] That admission refutes the claim that a search at relevant times by the PSC of the permit records would have disclosed Mr. Tessier as owner and his current address.

the re-assessment of the *ad valorem* taxes. This would explain why, in April, 1995, (when he still had no permits) Mr. Tessier told Mr. Inman, a real estate appraiser working for the PSC, that he was not a part of the class action and did not want his property appraised or inspected for damage from the Combustion site.[9]

(8) The Court may have inferred that Mr. Tessier was intending to "side-line" the class action, waiting on the outcome, and denying he was bound by an adverse judgment because he did not receive a personal notice.

III. Whether reasonable effort would have included a search of any public records that contain Mr. Tessier's name and address.

Mr. Tessier is the only class member of approximately 10,000 plus, who is complaining of lack of notice. That fact alone is highly probative of the quality of the efforts at notification.

Respondents take strong issue with the repeated statements by Petitioner leading up to the ultimate contention that the PSC did not send individual notice of the pendency of this class action to *any* class member who had not first contacted the PSC.

As reflected in the *Statement of Facts*, in the *Summary of PSC Operations* and in the *Ruling* of the district court dated June 13, 1997, on remand [Pet. App. 5a-15a], the attorneys representing the named plaintiffs during the seven year pre-certification period engaged in prodigious

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[9] Mr. Inman's testimony to that effect was in direct contradiction to Mr. Tessier's testimony that he had no knowledge whatsoever of the class action until he received a call from a lady in attorney Unglesby's office in July, 1995.

efforts to acquaint potential class members with this litigation. During this time they were restricted from engaging in outright solicitation, although general informative communications would be permissible under the pre-certification ethical guidelines. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); Newberg on Class Actions, Third Edition, § 15.12, *Precertification Communications by Class Counsel.* Nonetheless, during that period, even under these restraints, the number of known putative class members rose from approximately 1,200 when the consolidated actions were originally filed in 1986, as reflected in the certification hearing held in April, 1991, to 7,083 putative class members when the notice of class certification was published in March, 1993, and rose to 12,957 as of the cut-off date in April, 1995, for filing proofs of claim. [A. 22a-23a]

Considering the fact that the class as defined consisted of people who at some time or another during the prescribed thirty-forty year period from the 1950s, lived, worked or owned property in this rural and small town area, the most reasonable approach to identifying them was through the widespread publicity the on-going litigation generated and word of mouth communications between members of this fairly small community. In these respects, personal notice to over 7,000 class members, in conjunction with repeated published notices in the Livingston and Baton Rouge newspapers could reasonably be expected to reach many more than those to whom the notice was actually mailed.

Appellants argue that the Livingston public records were the best source of this information; however, this assertion ignores the evidence of the far-from ideal organizational structure of the Livingston public records at that time, and the fact that the records would have to have been searched and traced for 30 years.

Permit Office

Appellant contended on page 17 of his brief in the Court of Appeal, "the easiest place to find Mr. Tessier from the Livingston Parish records was the place the PSC did not check – the Livingston Parish Office Permit Office." Appellant refers to exhibits which do not support this contention. However, Mr. Tessier himself testified that he checked the permit office records, and that there was no record of any permit application by him until May 10, 1995. [A. 64a] That was after the filing deadline, as extended, had expired. Therefore, use of such records by the PSC would not have led to Mr. Tessier's name or address.

Tobin Maps

Mr. Tessier's name is not shown on the Tobin maps. In order to find his name associated with the property, and armed with his own personal recollection, he had to first search for the property on the Tobin maps, and then search the title forward in the conveyance records, which required the assistance of Clerk of Court personnel.

None of these records were computerized at that time. [A. 42a-43a, 55a-56a] To determine ownership of property in Livingston Parish (60,000 property owners) would have required running the title on each tract, or portions thereof, to date, accounting for each transaction as to each piece of property during the intervening twenty to thirty years, depending on when the title was run. According to Mr. Davidson, to complete this work would have required 5,000 man hours or approximately 125 weeks. [A. 38a-39a] According to Mr. Frank Edwards, a PSC member, this work was not a question of expense; it would have inundated the Livingston Parish Clerk's Office. It was his opinion that such an approach was not at all practical. [A. 54a-55a]

Assessment Rolls

The testimony shows that the assessment records were not computerized until the year before the hearing in 1997. [A. 42a-43a, 55a] Mr. Charles Abels, Tax Assessor of Livingston Parish, testified prior to that time, one could determine who owned property in Livingston Parish only by examining the rolls for each year. Even if restricted to some 20,000 property owners in the subdivisions (wards), of which portions could have been affected by the Combustion Site, checking the assessment rolls for the number of years involved would have been "an insurmountable undertaking," considering the changes occurring from year to year. His opinion was the most practicable and reasonable manner to notify affected property owners was through the local media and newspapers. [A. 41a-45a]

Phone Directories and Voter Registration Rolls

Appellant suggests other sources, such as voter registration records, telephone books, etc., as a reasonable means of identification. However, Mr. Tessier testified that he had moved out of the Parish in 1981 or 1982, which was twelve years before the certification notice was issued. Therefore, use of the phone directory or the voter registration rolls would not have revealed Mr. Tessier's name or address.

911 Records

Obviously, the purpose of 911 emergency phone call systems is to know exactly the location of someone who is suffering an emergency requiring the immediate assistance of the police, fire, or emergency medical personnel. Thus, they can be expected to show only who lives at a location; not who owns it. Mr. Tessier testified that he did not live at the property during 1986 through the extended deadline in April, 1995. Such records could not be expected to reveal the names and addresses of persons on

non-resident landowners such as Mr. Tessier. The utility of these records is questionable in view of subsequent alterations. [A. 58a, 60a]

The testimony of Mr. Pardue, an experienced attorney-abstractor in Livingston Parish, confirmed the problem encountered by the PSC other than one-on-one or group personal contact: No matter what records one examines, whether voter registration rolls, utility rolls, census rolls, conveyance records, or otherwise, the task would be multiplied by the number of years, since residence or ownership must be determined for each year. [A. 36a]

After considering this evidence, the district judge concluded that the means employed by the PSC to disseminate notice to the Class "were reasonably calculated to reach every member of the Class in the most practicable method possible under the circumstances." [Pet. App. 5a] FRCP 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notices to all members who can be identified through reasonable effort."

"No single formula can be derived which will anticipate the myriad circumstances that may confront class action litigants attempting to identify absentee class members in a 23(b)(3) action and resolve whether the effort required is reasonable." *In re: Nissan Motor Corp. Litigation*, 552 F.2d 1088, 1097 (5th Cir.1977). The "effort" indicated to be reasonable in *Nissan* and in each of the cases of this Court discussed in Nissan, involved means of identification by which absentee class members could *easily* be determined, although not without time, effort and expense. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 70 S.Ct. 652, 659, 94 L.Ed. 865 (1950), the Court rejected the trustee's contention that constructive notice was adequate as to those beneficiaries *whose names and addresses were known to the trustee.* Twelve years later, this Court reaffirmed this principle, stating that notice by publication is not enough with respect to a

person whose name and address *"are known or very easily ascertainable."* (Emphasis added.) *Schroeder v. City of New York*, 371 U.S. at 212-213, 83 S.Ct. at 282 (1962). The third case in this trilogy is *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 2151, 40 L.Ed. 732 (1974), where in reviewing the district court's findings that potential class members were identifiable in computer listings, this Court noted that "the names and addresses of 2,250,000 class members *are easily ascertainable*, and there is no showing that individual notice cannot be mailed to each." *Eisen*, 417 U.S. at 175, 94 S.Ct. at 2151. This is not a case similar to *Nissan* or *Eisen* where potential class members could *easily* be identified through review of the defendants' records. This was a geographical mass tort action in which widespread publicity, advertisements and personal contact could reasonably be calculated to inform those potential class members (or those who cared) of the pendency of the action and alert them to the requirements of the proceeding.

Appellee submits that the reasoning of the trial judge that the PSC efforts to notify potential class members "were reasonably calculated to reach every member of the Class in the most practicable method possible under the circumstances," [Pet. App. 5a] constituted a fair assessment of the evidence submitted at the hearing on remand. "The determination of what efforts to identify and notify are reasonable under the circumstances of the case rests in the discretion of the trial judge before whom the class action is pending." MANUAL FOR COMPLEX LITIGATION – THIRD, § 30.211, *Certification Notice*.

IV. Compliance of the dissemination of notices with FRCP 23.

First, the time frame is an important consideration since the notice of class certification was mailed out in March, 1993. At that time and under the circumstances then existing, for the reasons stated above, a search of the conveyance records and the tax rolls would not have been

a feasible approach in determining property ownership over and during a 30-40 year period of time.

Second, the focus of the search is an important consideration. The PSC was not faced with the task of notifying one particular person. Nor was the task even as tidy as notifying a large number of persons whose names were known. Instead, the class was defined as tens of thousands of unnamed persons who were included because they had contacts of various types, (either residence, school, or work) with any part of an entire Parish, at any time or times in a 30 year period. The PSC gave this process its best effort since it did not wish to exclude anybody. [A. 53a][10]

In this context, the finding of the district court on remand appears supported by the authorities and commentaries. The comments in NEWBERG ON CLASS ACTIONS, THIRD EDITION, § 8.02, at p. 8-1, in discussing the impact of *Eisen IV*,[11] are appropriate here:

> "The discretion built into Rule 23 belies attempts to restrict procedural passage into a single charted avenue. The Supreme Court's confrontation with the class rule does not indicate otherwise. Its refusal to rely on due process, the vacating of the decision below [citation], the failure to rule on management problems, including fluid class recovery, the narrow resolution of the jurisdictional matter [citation], and the invitation for petitioner Eisen's continued use of the class action device [citation], *leave open the door to flexible class application which the amendment of*

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[10] Indeed, at that stage of the proceeding, it was to the advantage of the class and its attorneys to include as many potential claimants as possible, because the nature and size of the class constituency determined the bargaining power of the PSC for the benefit of the Class.

[11] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 732 (1974).

> *Rule 23 was intended to promote.* [Citing *Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1097 (5th Cir.1977)]. *What amounts to reasonable efforts is for the court to determine in each circumstance [citation]. In all cases, the Court should strike an appropriate balance between protecting class members and making Rule 23 workable."* [Emphasis supplied.]

As this Court stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20, 70 S.Ct. 652, 659-60, 94 L.Ed. 865 (1950):

> "We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. 'Now and then an extraordinary case may turn up, but constitutional law, like any other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.' " (Citations omitted.)

V. Once a putative member of a class obtains actual notice of the suit, he may not simply put it out of mind and have no responsibility for looking into or monitoring the case to obey orders of the court, assist counsel, and protect his rights.

Mr. Tessier, in begrudgingly and belatedly admitting now that he was aware of the pendency of the suit, claims he was entitled to some undefined "legal, Constitutional notice." [Pet. 10]. However, all of the case law he cites on standards for notice refer to the original notice of the pendency of the suit. E.g., *Mullane*, 339 U.S. at 314: "notice reasonably calculated, under all the circumstances, to apprise interested parties **of the pendency of the action** and afford them an opportunity to present their objections." These cases and standards do not apply to later notices in the case, such as a notice to file proofs of claim. Indeed, the petition focuses its criticism on the original notice sent to announce the class action, and does

not cite as error the manner of later notifying the class of the proof of claim requirement and deadlines. That is because the methods of such later notices are not governed by Rule 23(c)(2) requirements,[12] but are instead placed within the discretion of the court by Rule 23(d)(2): . . . "that notices be given *in such manner as the court may direct* to some or all of the members of any step in the action." It is undisputed that the particular notice that Mr. Tessier failed to heed was given in the manner ordered by the court and was approved by the court. So the issue here really comes back to, and only to, was there clear error in the factual finding of Mr. Tessier's awareness of the pendency of the lawsuit, and whether he was entitled to a personal notification addressed to him specifically of the pendency of the lawsuit.

The revised position of Mr. Tessier, that he may have known of the suit, but did not know it applied to him because he did not receive individual notification [Pet. 8-9], implies publication could never be an acceptable notification in any case, or any acceptable supplementation to individual notices to identified members. The argument also implies that an absentee class member may never be required, in the absence of an individually addressed letter to him, to file a proof of claim or, in fact, do anything to assist counsel or the court in assessing, managing, settling or litigating the class action, even if ordered to do so by the court. He implicitly claims he is free, after learning of the suit, to read newspaper articles and formal notices in the newspaper and just choose to ignore them, i.e., to treat them as "not ringing a large bell."

The law is to the contrary. "Absent class members must be alert for the possibility that they must respond to a proof of claim notice in order to prove their actual

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[12] Fed. R. Civ. P. 23(c)(2) calls for "the best notice practical under the circumstances, including individual notice to all members who can be identified through reasonable efforts."

damages and to participate in any recovery. Absent class members should ascertain whether the proof of claim form requires a mandatory response and whether it establishes a bar date beyond which the court will not accept the form." NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS – THIRD EDITION § 16.04 (3rd ed. 1992), cited and quoted in *Grace v. City of Detroit*, 145 F.D. 413, 418 (ED Mich. 1992) ("absent class members must be alert for the possibility that they must respond to a proof of claim notice in order to prove their actual damages and to participate in any recovery."). They may not be allowed to "sleep on their rights," and assume their interests are being protected without further action on their part. *Bing v. Roadway Express Co.*, 495 F.2d 441, 449 (5th Cir.1973).

The quote from *Martin v. Wilkes* in the Petition at page 9 reinforces the point that once notice of the class action suit and of the limits and membership of the class has been sent, an absentee class member does from that point have a "duty to take note of a suit or to exercise . . . responsibility with respect to it in order to profit from the eventual outcome of the case." 490 U.S. 755 at 765, 109 S.Ct. 2180 at 2186, 104 L.Ed 2d 835 (1989)

The new claim that Mr. Tessier knew of the suit, but did not know it applied to him does not stand up to analysis. The court-approved notice requiring proof of claims to be filed that was published six times in THE ADVOCATE, which Mr. Tessier admitted he read regularly, made it quite clear that the suit applied to persons such as him. [Pet. App. 6a-7a]. Mr. Tessier obviously knew he was within that class definition. Given the circumstances more fully discussed above, if the class action did not apply to Mr. Tessier, to whom would he think it applied?

In *Burns, et al. v. Elrod, et al.*, 757 F.2d 151, 155-56 (7th Cir.1985), the court ordered that notice be sent to individual class members and also published. A fairly cohesive group of class members (as Mr, Tessier and his tenants were in this case) were complaining that some had received individual notice and others had not due to

problems of identification. In affirming the district court's denial of applications to file late claims, the court said:

> "It could be assumed safely that people who had worked together in an office were not all strangers to each other, yet the 200 mailings which were mailed successfully apparently did not produce the word-of-mouth which might have been anticipated. In a situation of this sort a line must be drawn and "finish" written on the litigation at some point. The district court properly determined that the finish line had been passed." *Id.* at pages 155-56.

CONCLUSION

Here, too, "finish" should be written on this attempt by a sole class member to sideline this case until a favorable result is reached, then complain of lack of personal notice where the evidence strongly indicates that he had all the timely notice he needed to protect his rights, but had other reasons for not coming forward. Accordingly, the petition for certiorari should be denied.

Respectfully submitted:

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APPENDIX

APPENDIX

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EXCERPT FROM BRIEF OF PATRICK TESSIER

* * *

[p. 29] In addition, "[w]ithout valid notice and an opportunity to opt out of the class, there can be no Res judicata effect given to judicial determinations of the claims of unrepresented parties." *Jones v. Diamond*, at 1023. See also *Richard v. Jefferson County, Ala.*, ___ U.S. ___, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). What are the rights of Mr. Tessier and the other class members who have not yet been given notice? Mr. Tessier asserts that the PSC owes full duty to those class members including himself who have not been notified but who could have been identified through reasonable efforts. The PSC must ensure the full participation of these class members in the proceedings and settlements. Once Mr. Tessier or others are allowed to join the class of Plaintiffs and have standing, Mr. Tessier asserts that they should be allowed the opportunity to participate in re-hearings of the fairness hearings and other hearings, specifically those which led to the establishment and approval of the scheme for distributing the settlement proceeds. Can these class members proceed anew against the Combustion, Inc. defendants under the present class action lawsuit?

Mr. Tessier asks the Fifth Circuit for as clear directions as possible to the district court as to the nature and extent of further proceedings to be held.

CONCLUSION

Mr. Patrick Tessier seeks to be included in the class of Plaintiffs in the In re: Combustion, Inc. litigation. The

uncontradicted evidence presented at his April 1, 1997 hearing for permission to file a proof of claim shows that Mr. Tessier was never notified

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suit, but that it did not "ring a big bell." While he may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit.

The Court shall again deny Mr. Patrick Tessier permission to complete a late proof of claim form.

THUS DONE AND SIGNED this 13 day of June, 1997.

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

[Trial Exhibit 7, p. 16a]

SUMMARY OF PSC OPERATIONS

Purpose of this Report: Provide a general chronological explanation of the PSC's efforts to identify and gather basic and detailed information on claimants, putative class members and class members and to keep them informed of this ongoing litigation. This report also summarizes public events demonstrating a community wide awareness of this litigation and the involvement of the PSC and its staff in this litigation.

1986 – Petition for Damages filed July 15, 1986

Plaintiff attorneys and staff collected basic information from their clients on Claimant Fact Sheet forms. (see form 1) Some of this information was entered into a master database by Eleanor Berthelot, computer specialist and paralegal to Calvin C. Fayard, Jr.

August 5, 1986 – the DEQ held a public meeting regarding the Combustion site at Walker High School, Walker, LA.

August 29, 1986 – the PSC mailed a newsletter to all known claimants advising them of the status of the litigation. (see mailout 1)

March 17, 1987 – the PSC mailed a newsletter to all known claimants advising them of the status of the litigation and requested verification of certain information. (see mailout 2)

June 13, 1988 – the DEQ published a newsletter entitled "Combustion, Inc. Remedial Investigation/Feasibility Study Settlement Agreement," which was circulated to all persons on its mailing list and posted at the Livingston Parish Library.

November 29, 1988 – the DEQ sent a letter to area residents advising that Keith Meyers and Kevin Poche of the LSU Institute of Environmental Studies, representing the LA DEQ, would be interviewing residents regarding the Combustion site.

December 1988 – a report summarizing the interviews conducted by Keith Meyers of LSU Institute for Environmental Studies was prepared for LA DEQ, Inactive and Abandoned Sites Division, entitled Survey of Residences Near the Combustion, Inc. Site Denham Springs, LA.

March 1990 – Quarterly Status Report of Superfund Sites published by U.S. EPA, discussed the Combustion site.

1990 – Motion for Class Certification filed May 30, 1990

May 31, 1990 – PSC mailed a newsletter to all known claimants advising them of the status of the litigation. (see mailout 3)

June 11, 1990 – the PSC opened an office at 506 Florida Blvd., Denham Springs, for the purpose of completing Claimant Medical/Property Questionnaires. (see form 2) Office hours were Monday-Friday, 8:00 a.m. to 5:00 p.m. Eleanor Berthelot was office supervisor with a staff of approximately four paralegals (interviewers) and a receptionist. The attorney supervisors were Hobart Pardue, Frank Edwards and Calvin Fayard.

The information obtained from these forms was entered into a master database designed and maintained by Eleanor Berthelot. The original database contained basic information on approximately 2490 known claimants and also included the attorney representing each. The information collected was used at the

state class certification hearing. In addition, the Medical/Property Questionnaires were used as plaintiffs' response to defendant discovery requests.

August 6, 1990 – area resident, Flo Barker, hosted a meeting of concerned area residents at 7:30 p.m. at 31153 Burgess Road. A representative from the state Attorney General's Office discussed environmental settlements entered elsewhere in comparable situations.

September 4, 1990 – area residents met to discuss developments in the litigation at 7:00 p.m. in the Walker High School Cafeteria.

October 16, 1990 – the PSC mailed notice to 2490 claimants of the PSC office opening at 506 Florida Boulevard, Denham Springs, LA. (see mailout 4) Additional known claimants were given the opportunity to either schedule an appointment or drop by for an interview. In addition, phone calls were made by the interviewers to claimants to schedule appointments. (see example effort 1)

February 1991 – the DEQ published a newsletter entitled "Combustion, Inc. Site Update February 1991," which was circulated to all persons on its mailing list and posted at the Livingston Parish Library.

April 16, 1991 – the DHH held a public meeting at Walker High School, Walker, LA, to discuss the Combustion site and to allow residents to express their health care concerns relative to exposure to toxic chemicals.

June 17, 1991 – H.E.L.P. (Help our Environment in Livingston Parish), met with Senators Cross and Sevario to discuss the Combustion, [sic] site.

March 5, 1992 – state and parish officials met with area residents to discuss evacuation plans in the event of another toxic discharge.

July 21, 1992 – the DEQ held a public meeting at Walker High School, Walker, LA, regarding the Combustion site.

August, 1992 – Defendants propound interrogatories on claimants designated by the PSC to be major medical claimants.

August 6, 1992 – a public meeting was held at Walker High School, Walker, LA, with area residents and environmentalists regarding proposed cleanup.

September 16, 1992 – PSC noticed each claimant designated by the PSC as a major medical. (see mailout 5) An additional 110 claimants who had completed Medical/Property Questionnaires were also asked by this letter to answer the major medical interrogatories. Interviewers placed follow up phone calls to this group to schedule interview appointments. (see example effort 2) A total of 412 claimants responded.

September 28, 1992 – the PSC opened an office at 1440 S. Range Ave., Denham Springs, for the purpose of answering interrogatories propounded by the defendants on major medical claimants who had completed Medical/Property Questionnaires, utilizing a computer program administered by Terri Duhon. (see form 3) Terri Duhon was office supervisor with Vanessa Abrams as assistant office supervisor and a staff of eight paralegals (interviewers), and a receptionist. Attorneys in charge were Hobart Pardue, Frank Edwards, Raymond Vinet, Calvin Fayard, and Donna Grodner. Office hours were Monday-Friday (and Saturdays as needed for the convenience of the claimants), from 9:00 a.m. until 9:00 p.m.

October, 1992 – the database at this time had increased to approximately 7865 claimants. 5143 claimants had completed a Medical/Property Questionnaire. Of

this group, 524 claimants were requested to answer major medical interrogatories.

November 30, 1992 – the PSC mailed a follow up to its September 1, 1995, letter to each claimant designated by the PSC as a major medical. (see mailout 6)

February, 1993 – the process of completing Medical/Property Questionnaires was discontinued. All claims and inquiries were routed to the office at 1440 S. Range Ave. New claimants were asked to complete an abbreviated revised Claimant Fact Sheet. (see form 4)

March 30, 1993 – Important Notice of Class Certification was mailed to all known claimants. (see mailout 7) This important notice was published in The Advocate and The Denham Springs/Livingston Parish News on March 27th and 28th respectively and was posted at the Livingston Parish Courthouse and other public places. The notice was published again in these newspapers on April 18th and April 20th. It informed all class members of the pendency of the class action and of their right to opt-out.

April 22, 1993 – DEQ held public meeting with community leaders, regarding Combustion site cleanup.

May of 1993 – the major medical interrogatory process concluded.

May 6, 1993 – deadline to opt out of the class. A total of 42 claimants filed opt-out requests with the Livingston Parish Clerk of Court.

August 1993 – the DEQ published a newsletter entitled "Combustion Update, Volume 1, No. 2," which was circulated to all persons on its mailing list and posted at the Livingston Parish Library.

October 1993 – the DEQ published a newsletter entitled "Combustion Update, Volume 1, No. 3," which was

circulated to all persons on its mailing list and posted at the Livingston Parish Library.

October 27, 1993 – the DEQ held a public meeting at Walker High School, Walker, LA, regarding the Combustion site at Walker High School, Walker, LA.

December 15, 1993 – six public health experts from New Orleans attend public meeting at Walker High School cafeteria to answer questions about a preliminary report on the health risks of living near Combustion, Inc.

1994 – Order regarding completion of Proofs of Claim

June 5, 1994, the PSC sent a letter to the 225 individuals selected to undergo IME testing and evaluation, advising them that they would be contacted to complete their POC form. (see mailout 8)

June 13, 1994, the PSC opened an office at 31514 Carter Cemetery Rd., **Springfield**, to assist in the completion of POC's for the 225 IME claimants. (see form 5) This office also concentrated on completing POC's for all claimants designated major medical. Hobart Pardue and Frank Edwards were attorney supervisors and DeVan Pardue, law student, was office supervisor with a staff of six paralegals (interviewers). Office hours were Monday-Sunday 8:30 a.m. until. The office basically maintained hours which allowed claimants to schedule appointments at their convenience. (see supplement 1)

July 13, 1994 – the Springfield claims office mailed a letter to those individuals of the 225 IME who had not yet completed their POC, advising that their deadline to do so is July 31, 1994. (see mailout 9)

July 27, 1994 – the PSC opened an office at 742 S. Range Ave., **Denham Springs**, to complete Proof of Claim forms for all claimants. William DeJean was staff

attorney, assisted by Terri Duhon, office supervisor, Vanessa Abrams and Scott Verret, assistant office supervisors. Staff consisted of two receptionists, seven paralegals (interviewers) and individuals for copying, mapping, and running errands and was expanded as needed. PSC attorney supervisors consisted of Frank Edwards, Raymond Vinet, Richard Reina, Hugh Sibley and Calvin Fayard. (see supplements 2 and 3)

July 31, 1994 – the PSC mailed by first class mail, postage prepaid, to all known class members a letter and Important Notice to All Class Members to file POC. In addition, this notice was published in The Denham Springs/Livingston Parish News and The Advocate on July 24th and 25th respectively. (see mailout 10) Claimants were instructed to contact the claims office to schedule an appointment. In addition, staff members called claimants to schedule appointments. (see example efforts 3, 4 and 5)

August 1, 1994 – April, 1995 – Frank Edwards, Billy Phillips, Tim Phares, Scott Verret and Charlie Abels made trips to several prisons to obtain signed POC forms from incarcerated claimants. Staff conducted various phone interviews with out-of-town claimants. POC form was mailed to claimants for signature, notarization and return.

September 15, 1994 – the PSC, by first class mail, postage prepaid, mailed to all known plaintiffs' counsel, copies of initial settlement order and list of claimants represented by that attorney. (see mailout 11)

September 22, 1994 – the Springfield claims office mailed a letter to individuals who had not been able to be contacted by telephone advising that they must contact the office to schedule an appointment to complete a POC. (see mailout 12)

November 24, 1994 – a letter, by first class mail, postage prepaid, was mailed to all known class members who had not yet completed their POC. (see mailout 13) In addition, the Important Notice to all Class Members was published again in The Advocate and The Denham Springs/Livingston Parish News on November 29th and December 1st respectively.

December 30, 1994 – the PSC by fax to all known plaintiffs' counsel sent a reminder of the December 31, 1994, deadline for submitting claimant names and advised of the extension of February 28, 1995, for completing POC on those claimants. (see mailout 14)

December 31, 1994 – the claims office remains open until midnight completing Proofs of Claim and Claimant Fact Sheets.

January 1, 1995 – Deadline for taking Claimant Fact Sheets (Notice of intention to file POC) on "new" claimants. Existing claimants are instructed to schedule an appointment to complete a Proof of Claim form prior to the deadline for doing so.

January 1, 1995 – 13,639 claimants had timely filed notice of intention with the PSC to complete a POC.

January 6, 1995 – individuals who had not notified the PSC by December 31, 1995, of their intention to complete a POC were allowed to sign a Log Sheet. (see example effort 6)

January 18 and 19, 1995 – the PSC mailed to certain plaintiffs' counsel a list of their claimants who had not completed the POC and advised that the deadline to complete a POC was February 28, 1995. (see mailout 15)

January 23, 1995 – the PSC mailed a letter to all known claimants who had notified the PSC of their intention to complete a POC but who had NOT completed a

proof of claim form. This letter advised of the March 2, 1995, deadline and outlined instructions on contacting the Denham Springs claims office to make an appointment to complete the POC. (see mailout 16, with mailing list attached) Members of the PSC made special efforts to contact individual claimants who had not yet completed a POC. (see example efforts 7 and 8)

February 7, 1995 – the Springfield claims office mailed a letter to certain individuals advising that the deadline for completing the POC was February 28, 1995. (see mailout 17)

March 7, 1995 – the Springfield claims office mailed a letter to individuals advising that the deadline to complete a POC had been extended until April 11, 1995, and that the Springfield office would be closing on March 18, 1995, and the Denham Springs office would be closing on April 11, 1995. (see mailout 18)

March 10, 1995 – the Springfield claims office mailed a letter to individuals who had completed but not signed their POC advising that their POC must be signed before it can be properly filed. The letter advised that the deadline to complete a POC had been extended to April 11, 1995, and that the Springfield claims office would be closing on March 18, 1995. (see mailout 19)

March 13, 1995 – the PSC by first class mail, postage prepaid, mailed to all known claimants who had timely filed notice of their intention to file a POC with the PSC by December 31, 1994, a newsletter informing them that the deadline to complete and file a Proof of Claim had been extended to April 11, 1995. (see mailout 20)

March 18, 1995 – the Springfield claims office discontinued taking proofs of claim. All claimants were

then directed to the Denham Springs claims office to complete a Proof of Claim.

April 3, 1995 – the PSC, by first class mail, postage prepaid, mailed a letter to attorneys and individuals who had submitted a Claimant Fact Sheet and/or attorney-client contract after the December 31, 1994, deadline. (see mailout 21)

April 11, 1995 – the Denham Springs claims office discontinued the proof of claim process. By this date, 9934 claimants had completed their POC.

August 10, 1995 – the PSC mailed a letter, newsletter, and Important Notice to All Class Members Regarding Partial Settlement to all known class members who had completed a proof of claim. (see mailout 22) This Notice was also published in the Denham Springs/Livingston Parish News and The Advocate on August 10th and again on August 24th.

August 10, 1995 – the PSC, by first class mail, postage prepaid, mailed a letter, newsletter, and Order Regarding Proofs of Claim and Important Notice to All Class Members Regarding Partial Settlement to all known class members who had not completed a proof of claim. (see mailout 23) 1123 individuals who had notified the PSC after the December 31, 1994, deadline were included in this mailout. This Notice was also published in the Denham Springs/Livingston Parish News and The Advocate on August 10th and again on August 24th.

August 10, 1995 – the PSC mailed a letter, newsletter, and Important Notice to All Class Members Regarding Partial Settlement to all known plaintiffs' attorneys. (see mailout 24) This Notice was also published in the Denham Springs/Livingston Parish News and The Advocate on August 10th and again on August 24th.

September 11, 1995 – deadline to give notice to the Court of request to file a late POC.

The claims office in Denham Springs continues to take names, addresses, phone numbers etc. of any individual who wishes to be included in this action. These individuals are also mailed the newsletter, Order Regarding Proofs of Claim and the Important Notice to All Class Members Regarding Partial Settlement. (see example effort 9)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.	*	ACTION NO: 94MDL4000
	*	ALL CASES
	*	JUDGE HAIK
	*	MAGISTRATE JUDGE TYNES

****

REPORTER'S OFFICIAL TRANSCRIPT
OF THE MOTIONS AND ORAL ARGUMENTS
BEFORE THE HONORABLE RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

April 1, 1997

* * *

[Tr. 18] records, as all the previous ones are, that were offered at the original fairness hearing on September 26th.

Tessier Hearing Exhibit Number 5 is the notice of partial settlement with an order regarding the filing of late proofs of claim, which include the notice of all the fairness hearings set for September 26th, and also includes the order of the Court regarding applications to file late proof of claims and the deadline that applies to that, all of which are taken from the exhibits that were offered at the original fairness hearing and which are attached to this exhibit for the Court's reference.

And Exhibit Number 6-A is a newsletter mailed by the plaintiff steering committee which enclosed the notice to all class members regarding partial settlement. 6-A

itself was the notice that was directed to class members who had not filed a proof of claim.

And 6-B is a newsletter with important notice to all class members regarding partial settlement. And that notice was sent to all class members who had filed a proof of claim. Both of these exhibits, 6-A and 6-B, having been offered at the September 26th hearing.

Tessier Hearing Exhibit Number 7 is a summary of the PSC activity. Again, these were documents that were offered at the September 26, 1995, hearing consisting of the affidavits of Terri Duhon, who also will be a witness here [**Tr. 19**] today, and the affidavit of Vanessa Abrams, and a summary of the PSC operations by the affidavit of Vanessa Abrams.

MR. SMITH: No objections.

MR. ROBINSON: Number 8, Tessier Hearing Exhibit Number 8, is the original report of Mr. Larry Bankston, Louisiana State Certified General Real Estate Appraiser, dated April 20, 1995.

MR. SMITH: No objection.

THE COURT: Tessier Hearing Number 9 is the supplemental report of Mr. Larry Bankston, the appraiser, dated May 31, 1995.

MR. SMITH: No objection. I have –

MR. ROBINSON: Tessier Hearing Exhibit Number 10 is Mr. Tessier's own application to file a proof of claim form including letter dated September 18, 1995 from Mr. Smith and a letter of September 18, 1995 from

Mr. Patrick Tessier with a map showing the location of the property attached.

Tessier Hearing Exhibit Number 11 is Mr. Tessier's tax assessments for property in Livingston Parish for the year 1994.

Tessier Hearing Exhibit Number 12 is a certified copy of a cash sale to Mr. Tessier dated December 30, 1982.

THE COURT: I'm sorry. That is not listed in here. Certified copy of the cash sale to Mr. Tessier?

* * *

[Tr. 25] TERRI DUHON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. State your full name and address, please.

A. Terri L. Duhon. 30244 Frank Murphy Road, Independence, Louisiana.

Q. What is your job, Ms. Duhon?

A. Computer operations supervisor.

Q. For?

A. For Calvin C. Fayard, Jr., APC.

Q. And in that connection, are you the supervisor of the computer operation with regard to the conduct of the Combustion, Inc. litigation?

A. Yes, I am.

Q. How long have you held that position?

A. I started working in '89 and took over that position in '92.

Q. That was on the death of Ms. Eleanor Berthelot who had been the previous supervisor?

A. That's correct.

Q. And you have worked continuously with all these records since that time?

A. Yes, sir, I have.

Q. I have asked you to prepare – provide the Court [Tr. 26] with certain information with regard to numbers and dates. And have you consulted those records and have determined those numbers and dates?

A. Yes, sir, I have.

Q. The first question is as of March 27th, 1993, when the notice of class certification was first published, how many people had already, quote, signed up, closed quote, to – with attorneys that represented what later turned out to be the class?

A. Seven thousand eighty-three.

Q. In other words, before certification there had been 7,083 people to say we want to file suit?

A. That's correct.

Q. And as of July 15, 1994, when the notice to file proofs of claim were sent out – that is not after it was sent

out but on that date – how many plaintiffs had signed up?

A. Seven thousand eight hundred and ninety-five.

Q. Now, as of April 11, 1995, which was the cut off date for filing proofs of claim, how many persons, class members, had filed proofs of claim?

A. Nine thousand nine hundred and thirty-four.

Q. When the notice of the fairness hearing on the first partial settlement was mailed out, how many class members was it mailed to?

[Tr. 27] A. To 12,957.

Q. Now, with regard to that difference between 12,957 and the 9,934 class members who had actually filed proofs of claim, with regard to the numbers in that difference, why were they sent notice?

A. Because they had contacted the PSC.

Q. And had given the intention that they intended to file a proof of claim?

A. That's correct.

Q. And had failed to do so?

A. Correct.

Q. All right. So the notices that were mailed out on – in connection with the notice of the fairness hearing was sent to every person that was known or even suspected by the PSC to be members of the class?

A. That's correct.

MR. ROBINSON: Any questions?

MR. SMITH: Just one or two, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q. Who were these notices sent to when they were mailed out?

A. They were sent to all known plaintiffs at this time.

Q. To the known plaintiffs. And the difference [Tr. 28] between 12,157 and 9,934, what was that?

A. Three thousand twenty-three.

Q. I mean who were these people?

A. Those were people that had either contacted us before December 31st giving us their name for intent to file a proof of claim, or those who had contacted us after we had sent out the notices.

Q. And this 12,157 is the final class total?

A. That's correct.

Q. Okay. So only a few more than 3,000 people contacted your office due to notice by publication?

A. Pardon me? Repeat that.

Q. Only a little over 3,000 people actually contacted your office without having first been notified by mail by you; is that correct?

A. I'm not quite sure what you are trying to get at.

Q. I'm sorry. The question is: How many people contacted you, and you said a little over 3,000. So are these the only people who contacted your office not having received actual written notice from you?

A. That's correct.

MR. SMITH: Okay. That's all I have.

REDIRECT EXAMINATION

BY MR. ROBINSON:

Q. I have only asked you this information with regard [**Tr. 29**] to notices that were actually mailed to people; isn't that correct?

A. That's correct.

Q. I have not asked you about publication?

A. No, sir.

MR. ROBINSON: Thank you very much.

THE COURT: Ms. Duhon, let me ask you a couple of questions just so I understand.

By March 27th of '93 there were 7,000-some-odd people, 7,083, that had already signed up and wanted to become part of the class?

THE WITNESS: That's correct.

THE COURT: This was before any publications of any kind?

THE WITNESS: We had had publication in the newsletter with the clients that we had previously.

THE COURT: So some of these people had already signed up, received some personal notices?

THE WITNESS: That's correct.

THE COURT: All right. Then on July 15th of '94 y'all sent out personal notices to some 7,895 people?

THE WITNESS: That's correct.

THE COURT: All right. And that was from the list of people who either read things in the paper or knew what was going on or lived in the parish or outside of – [Tr. 30] whatever, those people – by that time you had 7,895 people?

THE WITNESS: That's correct.

THE COURT: A year later you had about another – close to 900 people or 800 people that signed up; is that right?

THE WITNESS: That's correct.

THE COURT: All right. And April 11th of '95 was the date that was set as the – I think that was one of the cut off dates to file a proof of claim. And that was mailed out?

THE WITNESS: That is how many had completed a proof of claim as of that date.

THE COURT: All right. 9,000 –

THE WITNESS: There were several notices between.

THE COURT: All right. So between July 15th of '94 and April 11 of '95, about another 2,000 or so individuals had signed up in that year?

THE WITNESS: That's correct.

THE COURT: But you actually mailed out notices to some 12,957?

THE WITNESS: Yes, sir, we did.

THE COURT: Because some people called or contacted you, et cetera?

THE WITNESS: That's correct.

[Tr. 31] THE COURT: But they had not yet filled out a proof of claim?

THE WITNESS: No. They had filled out a notice to file a proof of claim.

THE COURT: So they filled out the notice but not the proof of claim form itself?

THE WITNESS: That's correct.

THE COURT: Okay. Do you have any – or do you know the breakdown of the number of people outside of the parish who signed up, or is that somebody else's field?

THE WITNESS: I can get that. I don't have that with me.

THE COURT: Where could you get it?

THE WITNESS: Off the computer.

THE COURT: Do y'all have that computer here today?

THE WITNESS: Yes, sir.

THE COURT: You do?

THE WITNESS: Yes, we do have it.

THE COURT: Can you retrieve that for me?

THE WITNESS: You want to know everybody outside of the parish?

THE COURT: Outside of Livingston Parish – who live outside of Livingston Parish, who have an address outside of Livingston Parish, by – of those 12,957 that you [Tr. 32] sent notices to, how many of those lived outside of Livingston Parish.

THE WITNESS: Okay.

THE COURT: Would you have that broken down by where they live?

THE WITNESS: Yes, by the addresses.

THE COURT: By the addresses?

THE WITNESS: Uh-huh.

THE COURT: But by computer can you pull up, for instance, how many live in Baton Rouge and how many live in Mississippi and how many may have lived in –

THE WITNESS: Yeah.

THE COURT: Has that been broken down already?

THE WITNESS: No, it has not.

THE COURT: If you can give me some indication. And the bigger number I'm concerned with, honestly, is Baton Rouge at this point. If you have a way of figuring that out, let me know. But certainly I want to know the numbers outside of Baton Rouge – I mean outside of Livingston Parish of that 12,957.

THE WITNESS: Okay.

THE COURT: All right. Thank you. We can call up the next witness while you do that.

(The oath was administered.)

MR. FAYARD: May we use the jury room to set up

* * *

[TERRI DUHON – Recalled]

[Tr. 80] THE COURT: Let's hear this young lady report back to the Court.

MR. ROBINSON: Oh, yes, sir. I'm sorry.

THE COURT: You are still under oath.

MR. ROBINSON: Do you want to ask the question or do you want me to?

THE COURT: Yes, I'll ask the question.

The question was: Of the 12,957 notices that you sent out by mail, how many were outside of the parish?

MS. DUHON: Well, actually, I thought I was doing exact parishes like by city. You asked for Baton Rouge.

[Tr. 81] THE COURT: Okay.

MS. DUHON: There was 598 that went to Baton Rouge.

THE COURT: All right.

MS. DUHON: And 3,012 went out of state.

THE COURT: That was 3,012?

MS. DUHON: Uh-huh. And then the other count that was next for the parish would be Hammond, and there was 77 mailed there.

THE COURT: That answers my question. Thank you very much.

Any questions on that, Mr. Smith?

MR. SMITH: No, Judge.

THE COURT: Mr. Robinson, any questions on that?

MR. ROBINSON: No.

THE COURT: Thank you very much.

* * *

[Tr. 33] HOBART PARDUE,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. State your name and address, please.

A. Hobart L. Pardue, Jr. P. O. Box 369, Springfield, Louisiana.

Q. Are you an attorney at law, Mr. Pardue?

A. Yes, sir.

Q. Practice in the Parish of Livingston?

A. Yes, sir.

Q. Mr. Pardue, are you a member of the plaintiff steering committee?

A. Yes, sir.

Q. As a matter of fact, isn't it true that you filed one of the class actions that was filed in this case?

A. Yes, sir.

Q. Do you remember approximately how many claimants that you named in that class action?

A. I think it was 900.

Q. Where did you have your offices at that time?

A. Springfield.

Q. And Springfield, Louisiana, is located in what [Tr. 34] part of Livingston Parish?

A. It is in the eastern side of Livingston Parish. It is approximately 20 miles from the site.

Q. Okay. Let's talk about Livingston Parish for just a minute. About how long is Livingston Parish, Mr. Pardue?

A. About 30 square miles.

Q. All right, sir. When you drive in from Baton Rouge and are going into Livingston Parish on the main highway, either the Interstate or on Airline, you cross the Amite River on the western boundary of Livingston Parish; is that correct?

A. That's correct.

Q. How far do you go after you cross the boundary before you get to Denham Springs?

A. About a couple of miles.

Q. So Denham Springs, Louisiana is very, very close to the boundary between Livingston and East Baton Rouge Parish?

A. Actually it may extend all the way to the parish line. I'm not real familiar with the city limits of Denham Springs.

Q. Is Denham Springs considered included in the metropolitan Baton Rouge area?

A. That's correct.

Q. All right. Now, from Denham Springs to the site, [Tr. 35] the Combustion site, approximately how far is it?

A. I would say about five miles.

Q. Okay. From Denham Springs to Livingston, Louisiana, how far is that?

A. About ten miles.

Q. All right. And then from Livingston down to Springfield is about 20 miles, you say?

A. Or 17 miles; right about.

Q. How far is it from Livingston to the parish line when you are on your way to Hammond?

A. About the same. Springfield is right on the line.

Q. Would it be safe to say that Livingston is approximately in the center of Livingston Parish?

A. That's correct.

Q. Okay. Now, did you have – were you set up in your Springfield office to interview and receive people who would come in to file a claim or to sign up or whatever you wanted to call it?

A. Yes, sir.

Q. In connection with this litigation?

A. Yes, sir. Actually we set up a satellite claims office in Springfield and we interviewed at least 2500 people.

Q. And there was another office, a main claims office, that was located where?

[Tr. 36] A. In Denham Springs.

Q. And then I believe one of the members of the PSC had an office in Hammond; is that correct?

A. Mr. Edwards, yes, sir.

Q. And Hammond would be over on the east side, not in Livingston Parish but right out of Livingston Parish, on the east side and further north than Springfield?

A. That's correct.

Q. Now, what was the purpose of the activities of the lawyers, either at the time before the plaintiff steering committee was formed or after the plaintiff steering committee was formed, with regard to getting the word out?

A. Well, we had to contact every person that would possibly be a potential claimant, and this was done several ways. I personally was on television at least – interviewed by the television stations in Baton Rouge on at least three occasions. Once when I was in court in West Baton Rouge Parish, once at a public meeting that was called in – over right near the site, and again a public meeting that was held at the Walker school.

I believe Mr. Edwards was on television at least once. Mr. Fayard was on television several times with interviews about this case early on. And the newspapers interviewed all of us dozens of times. And there was dozens of statements in publications of the Denham Springs News, [Tr. 37] and there was also some news articles in the Advocate.

Now, these weren't legal publications for notice, but they certainly were news stories that anybody could have seen if they read any of those newspapers.

Q. While we're on newspapers, what was the – what were the newspapers that were published in Livingston Parish itself?

A. The Denham Springs News and I believe they had the Livingston Times at that time. I'm not certain of that, though. There was another weekly newspaper, and then the Denham Springs News is published twice a week.

Q. What type of circulation does the Denham Springs News have in Livingston Parish with regard to what you know from living in Springfield?

A. I can't tell you the circulation, but it is put out all over the parish. I mean, you can find the Denham Springs News in a newsstand in Springfield or Livingston or Albany or even down in Mourepas or Port Vincent; just about any of the little communities. And then they're mailed to subscribers all over the parish.

Q. What about the Baton Rouge newspaper, the Morning Advocate? I believe at that time we also had the State Times but they were both under the same management. Did they receive widespread circulation in Livingston?

A. Yes, sir, the same way. All of the – every [Tr. 38] little crossroad store would generally have a newspaper box for the sale of Baton Rouge Morning Advocate, and just about everybody that subscribed to a newspaper in Livingston Parish would get the Advocate rather than the Picayune from New Orleans.

MR. ROBINSON: Your Honor, at this time I would like to offer by reference the publications that were filed in the record at the September 26th hearing as Fairness Hearing Exhibit V. I won't try to – I'm going to actually put those in, but I would like to retain them for just a moment.

MR. SMITH: I will take a quick look at them.

THE COURT: Sure.

MR. ROBINSON: (CONTINUING)

Q. Did you attend any type of community meetings in the Livingston area, Mr. Pardue?

A. Dozens of meetings, Mr. Robinson. I was – once I was contacted by a man who had had a piece of property that he was trying to sell, and he thought he had a deal and then suddenly the sale fell through. And he questioned the purchaser, and the purchaser told him there was a hazardous dump close by. And then he went and checked this and then he came to me. And I went and checked it. And word of mouth between my client and some of his neighbors, they asked me to come talk to them and meet them in the [Tr. 39] neighborhood and – to explain what could be done about this.

Q. Approximately when was that?

A. That was in about July of 1986.

Q. And it was before you filed the first suit?

A. That's correct. Once I had that one meeting, then I was inundated with calls from people from the area. And to make it more convenient to them, they would set up meetings of neighbors in neighborhoods and invite me to come to their residences. And I would come up there at night when they was off from work and explain to them the possibility of the lawsuit and such that I planned to file.

Q. Mr. Pardue, the first notice of class certification that was issued in this case was in March of 1993, and you had commenced your work on this case in 1986, some seven years before; is that correct?

A. Yes, sir. My lawsuit was filed in 1986.

Q. All right. And during that time, you – did you make every effort to try to locate as many people as you could who might be affected by this site?

A. Yes, sir. Continually during that period of time the PSC had organized and decided we would work together even though we weren't officially appointed by the Court at the beginning. And we had agreements that the clients could come to my office, they could come to Mr. Edward's office, [**Tr. 40**] or Mr. Fayard's office, or whoever. And when I would get a telephone call from a client, say in Walker, that couldn't come to Springfield, I would say, well, go down and see Mr. Fayard or – and this worked back and forth.

Q. Now, Mr. Pardue, when the time came for the notice to be issued of class certification, the first notice went out, which would have been in March of 1993, did the PSC delegate among its members the task of trying to locate – to formulate a manner to get out notice the best way it could?

A. Yes, sir.

Q. Did you have anything to do with that effort?

A. Yes, sir, I did. During the period of time from 1986 to 1993, the mail routes were changed where people, when they first signed up with me in 1986, in July or August of 1986, would live at, say, Route 3, Box 77, Denham Springs. And between that time and 1993, those routes were changed and the parish went into a 911 address system to give everybody a specific address.

I contacted Mr. Delmas Taylor with the Livingston Parish Police Jury at that time who was a permit officer and he had the old mail routes and the new mail routes. And I believe he delivered those – those were delivered to Mr. Edward's office to Mr. Davidson so that they could work up some maps so that they could be done. That is one thing [**Tr. 41**] that I needed.

Another thing that I did, I went to the fire departments in Walker to try to determine that the – that we could get the 911 address so that we could contact every single person. And while I was talking to the secretary of the fire department, I discovered, for instance, she hadn't signed up and she had lived in that area. And right then I told her, I said, you need to go down to the claims office and sign up.

And later on, as time progressed during that period, we were searching for the – to determine the clients that were more severely injured; the ones who had the cancers and leukemias, and such. And I would follow through when one client – for instance, many of those children went to St. Jude and a client would tell me, my child saw another child at St. Jude Hospital, and that child's parents live in Baton Rouge but they did live over in Livingston. I traveled to Baton Rouge to let these people know that they had a potential claim in this case and they were – so that they could be included.

When I would go out to see some of my clients who hadn't come in to answer interrogatories and things like this, I would tell them, tell your neighbors, tell your friends. Make sure you get everybody that has a claim to come in and come to these claims offices and sign up.

* * *

[Tr. 49] THE WITNESS: Well, Your Honor, in Livingston Parish the only way – if you just want to find out who owns some land in Livingston Parish, you can start with the tobin map, the ownership map. That map was published in the 1950s. It has not been revised since then. You could go to a map and look in the section and in 1950 find out who owned every piece of property in that section according to that map.

Then you would have to run the records for the sales from that person who owned the land at that time to any sales from 1955, say, to 1995; 40 years of abstracting of every single name.

But that is just in one section. The class – the class is the whole Livingston Parish. It would just be an insurmountable task to have to check every single record in Livingston Parish.

THE COURT: So you have to check the tobin maps and –

THE WITNESS: Well, that's a start, you know. That's a start. Actually, Mr. Davidson is more qualified to testify as to the possibility of setting up a computer system and what would have to be done to do it the most accurate and complete way.

I know what I would have to do if I knew what section and I needed to find everybody in that section. And [Tr. 50] I can say generally it would just take months and months just to dig it out.

* * *

[Tr. 69] A. Absolutely.

Q. So if you had to determine every property owner in a 20-year or 30-year period of time you have to practically check every one for each one of those years?

A. That's correct. Actually, Mr. Robinson, when in the last six months, we were doing some analysis on these other property claims and I went back and double checked and found the old 1986 tax rolls and double checked the list of names that I had to make sure that these people actually owned the property in 1986 at the time the suit was filed. And I came up with three or four people that bought it in 1987 even though they said '86. So you are absolutely correct about that.

Q. So no matter what records you go to, voter registration rolls, utility rolls, census rolls, conveyance records, or anything your job is multiplied by the number of years. You have to determine ownership for each year. Is that a fair statement?

A. Yes, sir, it certainly is.

* * *

[Tr. 71] DIRECT EXAMINATION

BY MR. ROBINSON:

Q. State your name, please.

A. Tom Davidson.

Q. What is your occupation, Mr. Davidson?

A. Litigation support paralegal for the law firm of Domengeaux, Wright.

Q. How long have you worked at Domengeaux, Wright?

A. Since 1986.

Q. Mr. Davidson, have you done work for this law firm in connection with determining or identifying class members in other class litigation?

A. Yes, sir, I have.

Q. And particularly have you done that with regard to locating owners of property?

A. Yes, sir, I have.

Q. Would you tell us the names of those class actions?

A. The most recent was the Thompson Hayward/ THAN litigation in New Orleans. I think the proper title happens to be Atkins V Harcross. Also the Lincoln Creosote litigation in Bossier Parish.

Q. All right. Now, with regard to the THAN litigation in Orleans Parish, how would you go about

* * *

[Tr. 74] help me within a two mile radius, two and a half mile radius, unless I knew the names.

Q. All right.

A. What we were looking for was similar – what we got in New Orleans by identifying blocks for a certain

area. We had some discussion and he said, no, I can't do that. In the course of the discussion, we identified that there was approximately 60,000 entries in his records.

Q. In Livingston Parish?

A. Yes, sir, at that time.

THE COURT: There were 60,000 taxpayers?

THE WITNESS: No, 60,000 entries on his roll, sir, was the approximate number I was given.

A. Taking that number, based on experience in other cases, it would take a tremendous amount of time for us to input into a computer system for mailing purposes those names. It takes an average of five minutes for a common key puncher to input all that.

MR. ROBINSON: (CONTINUING)

Q. Let's go very slowly through this. In order to do that, you would have to get from the Clerk the list of every property owner in Livingston Parish?

A. That is correct.

Q. And that would only be as of that current time?

A. That's correct.

[Tr. 75] Q. And then you would have to translate that into a database by taking the information off the Assessor's record and putting it into your database?

A. That's correct.

Q. How much time does it require for a keypunch operator to make one entry?

A. Average is five minutes on the type data we collected, which is name, address, and the property description.

Q. And you would have to verify it?

A. That's correct.

Q. How many man hours would it have taken had you approached it on that – from that standpoint just to prepare a database with the names and addresses of the current property owners of property in Livingston Parish in 1993?

A. It would have taken one person, one daily inputter, approximately 125 weeks.

Q. One person?

A. One person.

Q. How many man hours would it require?

A. Okay, sir. Approximately 5,000.

Q. You have a 5,000-man-hour job that would take one person 125 weeks to complete, and all you would have would be a mailing list?

[Tr. 76] A. That's correct.

Q. And all you would have would be a mailing list for one year?

A. That is correct.

Q. What about the Clerk's office?

A. Mr. Abels called for the Clerk, Mr. Pattern, who was not in, and spoke to one of the ladies in the property

records. And I was shown the tobin maps is all they had that they could offer me for mapping to work from a given area. And those things were 25 years old to 30 years old. The requirement from experience to run a piece of property takes about an hour per tract to do it right on a very simple, uncomplicated deal. The question was asked by, I believe, Mr. Edwards, could we run the property. And my response to him was there is not physical facilities in the Livingston Parish courthouse to do so. The –

Q. Let me ask you first, what would it take if you had to go to the tobin map, which was out of date at the end of 1955 –

A. That's correct.

Q. So you had to get whoever owned the property at that time and run that person forward?

A. That's correct.

Q. And then keep a record of who owned it all in between there because you need those people, too, don't you?

[Tr. 77] A. That's correct.

Q. But you have a 30-year period of time?

A. A 30-year period of time. And assuming a simple transaction with just one or two sales, no successions, no heir property, you are talking about an hour per piece of property for one person.

Q. So what did you come up with in the way of a conclusion? Was it physically possible [sic] do that through the Clerk's office?

A. No, sir, because of the lack of physical facilities there to do it.

Q. And you would have to run titles on 60,000 property owners for a 20- or 30-year period?

A. That's correct.

Q. What about utilities? Did you make any effort to try to locate a list from the utility companies?

A. Yes, sir. I contacted Gulf States Utilities who at that time had the biggest part of the customer base in that area of Livingston Parish. Ended up talking with some people in Beaumont, Texas. And before it was all said and done, talking to their legal counsel, and were asked would a subpoena from the Court help us get the records. His response was he would fight such a subpoena to the U.S. Supreme Court. That that was private business records.

* * *

[Tr. 82] BY MR. ROBINSON:

Q. Please state your name.

A. Charles Abels, III.

Q. Mr. Abels, what is your present position?

A. Assessor in Livingston Parish.

Q. How long have you been the Assessor?

A. Since January.

Q. Did you formerly work in the Assessor's office?

A. Yes, sir. I started in March of 1990.

Q. And what position did you hold?

A. Chief deputy.

Q. And who was the Tax Assessor at that time?

A. My grandfather, Charles Buddy Abels.

Q. Now, Mr. Abels, how are the tax assessment records maintained in Livingston Parish at the present time?

A. We have – the current tax roll that we have for '97 would be from the prior year, from '96. The records are kept in books that are under a cabinet in our office. The other years are – as Mr. Pardue said, are in storage in the Sheriff's office because of the lack of space.

Q. All right, sir. Now, how are they – if I wanted to come in there and say I wanted to know who owns property over on Milton Road in such and such a location, could you help me locate that person?

A. Not – are you talking about in '94?

[Tr. 83] Q. Yes, sir.

A. During that time, no, sir. We're now –

Q. What if I came in and said I want to know everybody that owns property in Section 26? Is there any way you could have helped me in '94?

A. No, sir, not at that time. Only by name. I would have to have the name.

Q. At the present time could you do it?

A. Yes, sir. We have a program right now.

Q. When did that program get completed?

A. Within the last month.

Q. Oh, that soon?

A. Yes, sir.

Q. Before then, you would have to know who owned the property –

A. That's correct.

Q. – in order to know where they were?

A. That's correct.

Q. Or where the property was?

A. That's correct.

Q. And at the end of the current year, you take the records for the year before that –

A. Yes, sir. That's the tax rolls.

Q. You put those in storage. Do they microfilm them?

A. Yes, sir. We're microfilmed now. Some of them –

* * *

[Tr. 87] whether he did or whether the other people did?

A. On only one, the one for himself.

Q. So would it be fair to say that the assessment record really tells you who may own the property, but it doesn't necessarily tell you who it is?

A. That's correct.

Q. Now, you heard the testimony of Mr. Davidson that Mr. Abels, your grandfather, told him it would be about 60,000 property owners. Does that sound approximately correct to you?

A. I would say pretty close.

Q. Now, suppose that I wanted to work only on, say, a three mile radius, and we're talking about a radius right in the middle of this map.

A. All right.

Q. That would encompass two wards, Ward 2 and Ward 11, would it not?

A. Yes, sir.

Q. At my request have you made a determination of how many property owners there are in those two wards?

A. It is an estimate, and the listing that we had was around 19- or 20,000.

Q. And that would be from Denham Springs to –

A. That is Ward 2, in that area.

Q. So if a person wanted to just send out notices to [Tr. 88] people that lived in those two wards, they would have to check the assessment records, if they are going to rely on the assessment records, for every year back to 1954 in that period of time that they were trying to determine who owned property that might be subject to this lawsuit; is that correct?

A. That's correct.

Q. That would be a pretty insurmountable undertaking?

A. Yes, sir.

Q. And it would be even more of an undertaking if it was the whole parish of Livingston?

A. Yes, sir.

Q. This is a rather simple question, but if a lawyer came into your office and said, Mr. Abels, I got to get word out to everybody that owns property in Livingston Parish that they might have a claim – you are familiar with how your office operates and you are familiar with how the Clerk's office operates and you are familiar with everything else. What would you consider to be the most reasonable way to get out notices – the most practical and reasonable way to do it under the circumstances?

A. I would say the local media, newspaper.

MR. ROBINSON: I have no further questions.

THE COURT: Mr. Smith, let's ask him questions about the map first, the questions that you have, and then

* * *

DALE INMAN

[Tr. 101] DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Mr. Inman, what is your profession or occupation?

A. I'm a real estate appraiser.

Q. Do you work with Mr. Bankston?

A. I do.

Q. Did you assist him on the project that he was just describing when he testified on the stand about going out and looking at property around the site?

A. Yes, sir.

Q. Did you take part in that?

A. I did.

Q. All right. Now, you also heard testimony that this work was completed before May 31, 1995?

A. That's correct.

Q. While you were working on this property, do you recall hearing the name Tessier?

A. Yes, sir, I did.

Q. About when was that?

A. It was in the second phase that we went back out there. It would have been sometime in April or early May of 1995.

Q. And how did that name come about to be mentioned to you?

[Tr. 102] A. As we were working certain sections, I would go from house to house. If I found someone home I would talk to them and find out about the property. And on one such occasion on one of Mr. Tessier's properties, as I later learned, I spoke to one of his tenants. He didn't know anything about what we were out there for. He said – I found out he was just a tenant and he gave me Mr. Tessier's name and he told [sic] he owned all these

houses on each side of the road; large and small houses, maybe some mobile homes. I'm not sure what all he did own. And –

Q. How far was that from the site, by the way?

A. That was on the outside of our – that was on the edge of our initial search, and I would say probably three quarters of a mile to one mile.

Q. He said there was a lot of rent houses?

A. Yes, sir.

Q. Were they on both sides of Milton Road?

A. That's correct.

Q. So there was a lot of people that rented out there, right, that you could tell?

A. Yes, sir. It appeared that all the properties were pretty well occupied.

Q. Did you call Mr. Tessier?

A. As I recall, I did, yes, sir.

Q. And did Mr. Tessier seem to express reluctance [Tr. 103] about your looking over the property?

A. Yes, sir. He didn't give me permission to measure any of the houses or, you know, do anything else.

Q. He said he wanted to talk to his lawyer?

A. I don't recall that statement.

MR. ROBINSON: That's all I have, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q. Mr. Inman, good afternoon.

A. Good afternoon.

Q. Just one or two questions.

When you contacted Mr. Tessier, what did you tell him about the class action?

A. I told him that we were working for the plaintiff steering committee trying to establish whether there were damages to real estate in that area around the Combustion site.

Q. Could it have been later than April of '95?

A. No, sir, I don't believe it could. That was the time period that we did our – we would go out for days at a time, and you have to understand that our other projects or other appraisals go on continually so there would be somebody else that would have to be taking care of those. So we kind of did it three or four days at a time or – you know, as part of the week. It was a pretty defined period

* * *

[Tr. 105] importance. We figured that the people on the outskirts –

MR. SMITH: (CONTINUING)

Q. The issue here is when Mr. Tessier knew or should have known. And if you had done this earlier – I guess it is a statement – but he would have known earlier.

Don't you agree? That had you come to him in November or December instead of April or May, he would have known about this before?

A. When I spoke to Mr. Tessier, I wasn't under the impression that I was the first – that I was notifying him. You know, I told him what we were doing but I wasn't telling him about the class action –

Q. How was it your impression that he was notified?

A. He just said he wasn't part of a class action and that he didn't, you know, need me to look at his property. I mean, he didn't express anything like he had trouble with tenants or anything.

MR. SMITH: That's all I have, Your Honor.

MR. ROBINSON: Any questions, Your Honor?

THE COURT: Yes, I have a couple. Do you remember calling Mr. Tessier?

THE WITNESS: I do, because he owned several houses also. Most of the properties we came to where individual owners, you know, or maybe they were a tenant of one owner. But when I came to a property and I find out [**Tr. 106**] that one man owned all these properties on either side of the road, I figured I could call this one man and get permission to do all these properties and I could get more done in a hurry. If I had his permission to go to all these properties and take pictures of the houses, measure the houses, look at all the improvements, I could get more done in less amount of time. That was our job. We were under a time restraint to look at as many as we could.

THE COURT: And you told him why you wanted to check out the property?

THE WITNESS: Yes, sir.

THE COURT: What did you to [sic] tell him? Not exact words, but the gist –

THE WITNESS: I don't recall the exact words, but it was to the effect that we were working for the plaintiff steering committee. That I worked for Mr. Larry Bankston and I identified who I worked for. I was a real estate appraiser, and that we were looking at properties around that Combustion site to try to determine if there were property values negatively impacted, I guess I should say. And he said that he wasn't a part of that class action or anything or – he didn't say, I don't know anything about it, or I decided not to fool with it, or – he didn't say, but he didn't want to give me permission to look at all his property. He just told me he didn't want me [Tr. 107] to look at his properties or whatever.

THE COURT: He didn't indicate one way or the other if he knew there was a class action going on?

THE WITNESS: No, sir. He didn't say one way or another. He just told me he wasn't part of one.

THE COURT: He told you that?

THE WITNESS: Yes, sir. I remember that part of the statement.

THE COURT: Okay. Did you tell him you were there to examine the property because of a class action?

THE WITNESS: I told him we were there working for a plaintiff steering committee because of that

Combustion site. He didn't indicate whether he knew anything about the Combustion site or not. I assumed, I imagine, that he knew about the site because it was – there were signs around. And I just figured he knew about it. I didn't know that I was telling him about the Combustion site. I mean, I didn't know –

THE COURT: Did he act surprised that you were calling him or do you recall?

THE WITNESS: I don't recall that he was surprised. Now, I might have been bothering him, I don't know.

THE COURT: Okay. Thank you very much. You may step down.

[Tr. 108] MR. ROBINSON: Mr. Edwards.

(The oath was administered.)

FRANK EDWARDS,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Mr. Edwards, you're a member of the plaintiff steering committee?

A. Yes.

Q. Your office is in Hammond?

A. Yes, sir.

Q. Did you take part in the decision that the best way to get out notice of this class action for all the notices for the proofs of claims and things like that?

A. Yes, sir.

Q. Did you undertake through Mr. Davidson to try to work out a way to try to locate people through the particular records of Livingston Parish?

A. Yes, sir.

Q. And when y'all discussed what would be involved, did you decide that that would be a reasonable way to do it, or would it be too much of a problem to do it from a time standpoint?

A. When you consider the time constraints and the tremendous manpower that would have been necessary, and the [Tr. 109] fact that the courthouse couldn't accommodate all of this research that would have had to have been just poured in on them. And the fact that the State gives notice by – courts give notice by publication, I figured that that was under all circumstances the most reasonable and practical way to do it.

Q. Incidently, you have been out to that site many times?

A. Yes.

Q. You have been on Milton Road, haven't you?

A. Yes, sir.

Q. Before the time to file proof of claims had ever expired – let's say before this class action was even

certified, let's say in 1993, were there any signs on Milton Road indicating the presence of a hazardous site?

A. Yes, sir. There was a big four-by-eight sign just south of the site.

Q. On Milton Road?

A. On Milton Road.

Q. What did it say?

A. You are entering a hazardous waste area. And it had a big skull and cross bones on each side of it.

Q. How long was that sign out there?

A. It was up there for several years.

Q. I'm just going to ask you just one last question. [Tr. 110] Was it ever the intent of the plaintiff steering committee to discourage anyone from filing a proof of claim?

A. No, sir. Quite the contrary. We wanted as many people as possible to sign up, to cooperate in the suit. We certainly did not want to exclude anybody.

Q. And so all the efforts that were undertaken by the committee and under the committee's direction, included checking records and documents and other kinds of records, the utilities, were taken with the view towards trying to contact as many of them as reasonably possible?

A. Yes, sir.

Q. In your opinion, was the method used by the plaintiff steering committee in its publication process as

well as in its mailing process for people they knew about, was that the most practical, reasonable way to give notice?

A. Yes, sir.

THE COURT: I have nothing further.

CROSS-EXAMINATION

BY MR. SMITH:

Q. Good afternoon, Mr. Edwards. As a member of the committee you are an attorney?

A. Yes.

Q. When you were considering how to disseminate notice, did you consider the U.S. Supreme [sic] Case of Eisen Versus Carlisle or the Fifth Circuit case of Nissan Motor [**Tr. 111**] Corporation Antitrust Litigation?

A. I considered the legal opinions of Mr. David Robinson who considered those cases, yes, sir.

Q. So if a cite – if the cases state that expense is not an issue or the stakeholder – the amount of stake a person holds is not an issue of whether a person is entitled to notice, you didn't consider that?

A. It wasn't a question of expense. You had a situation where we could not have inundated the Livingston Parish courthouse and do it. I just don't believe that that was at all practical.

Q. How many copies of the tax rolls are kept, do you know?

A. I would think that the Assessor has one, the Clerk has one, and the Sheriff has one.

Q. And the Tax Assessor?

A. Yes, sir.

Q. Can these records be purchased – copies of them be purchased?

A. You can go in and make copies of any public record, but in order to do that you have to go get it and do it. And I don't know of any public official anywhere that will let you take their records out. It is very rare; very rare.

Q. But they couldn't make a copy and sell it to you?

[Tr. 112] A. They – I wouldn't think they would be able to make a copy of the assessment record in Livingston Parish because it is bigger than any copy machine out there. And the assessment roll is about that thick (indicating). A book page is about that long (indicating). And I think if you wanted copies you had to go out there and do it yourself.

Q. People could have gone out there and started making copies, couldn't they?

A. Could, yes, sir.

Q. I think realtors get these records all the time. They pay the Sheriff for copies, and we've had some litigation in Baton Rouge about that. But –

A. Now, I think Baton Rouge has computerized records and I think Livingston, up until this year, did not.

And it is a big difference. They print you the computerized records and give them – they don't give them to you. They sell them to you very, very, very cheaply. But that wasn't available.

Q. How about the tax records in Livingston Parish? They are not computer-generated?

A. No, sir.

Q. Could the Assessor lend you a copy?

A. Could he? I don't think he would. I have never known a Sheriff or a Clerk or an Assessor to let their

* * *

[Tr. 118] DIRECT EXAMINATION

BY MR. SMITH:

Q. State your name for the record.

A. Delmas Taylor.

Q. Where do you work?

A. With the Livingston Parish Council.

Q. What do you do?

A. Well, I'm with the permit and address department, right-of-way section.

Q. Okay. Mr. Taylor, I'm interested in your permit indexes and records. Do you maintain such?

A. I maintain records, yes.

Q. You maintain indexes?

A. Well, you say indexes. Would you explain.

MR. ROBINSON: I'm going to have to intervene here because these two gentlemen are talking very soft and I can't hardly hear them.

THE COURT: If you both speak right into that microphone, that would help.

THE WITNESS: I'll do just that.

MR. SMITH: May I approach the witness?

THE COURT: Sure.

MR. SMITH: (CONTINUING)

Q. Could you identify these for the Court. Let me show them to you.

* * *

[Tr. 125] THE COURT: So the big cities in Livingston have their own?

THE WITNESS: Have their own addresses.

THE COURT: You handle the rural and the smaller communities?

THE WITNESS: I help with the addresses even in Walker and Livingston. Denham handles their own.

THE COURT: All right.

MR. ROBINSON: (CONTINUING)

Q. Now, what you have on this first sheet –

MR. ROBINSON: What were you going to number these?

MR. SMITH: I thought I numbered these 1 and 2 for us.

THE COURT: Well, if we're all going to refer to them, let's introduce them into the record and give it the weight it deserves.

MR. ROBINSON: (CONTINUING)

Q. Tessier 1 you have at the top A.G. Eby and it is marked out and written in Pat Tessier rentals?

A. That's correct, yes, sir.

Q. Can you tell us when that was done?

A. No, sir, I can't.

Q. Now, this page is dated 1-22-86. Is that the date the original papers were prepared?

[Tr. 126] A. That is the date that they gave these addresses, yes, sir.

Q. So when A.G. Eby was scratched out and Pat Tessier was placed in, you don't know when that happened?

A. No, sir, I do not.

Q. And everywhere the name Pat Tessier appears in here it is Pat Tessier rentals; is that correct?

A. Yes, sir, that is what I would say.

Q. And every address given would be on Milton Road in Walker, Louisiana; is that correct?

A. Yes, sir.

MR. ROBINSON: I have no further questions.

THE COURT: Let's mark those for identification as Tessier 1 and 2. We'll introduce them into the record. Redirect.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Taylor, if you knew an address, there is a good chance that you would find the name from these records, is there not?

A. If I knew an address, yes, sir, I suppose so. You could ask the renter – whoever is there who he is renting from. I would suspect you could, yeah.

Q. But a permit could be listed in the owner's name?

A. A permit could be listed in the owner's name, yes.

* * *

[Tr. 129] A. I think there is probably 12 or 15, 13. I may be wrong there.

MR. SMITH: That's all. Thank you, Brother Taylor.

THE COURT: Any other questions?

MR. ROBINSON: Yeah, just a second.

RE-CROSS EXAMINATION

BY MR. ROBINSON:

Q. If on September 18, 1986 I had written a letter to Pat Tessier rental, 3577 Milton Road, Denham Springs, Louisiana, would that have gotten to him?

A. I'm not sure.

Q. Well, why aren't you sure?

A. The reason I'm not sure is because if there was no receptacle out there, no mailbox, they would have wrote back saying there is no receptacle. He could have had a P. O. Box. So –

Q. There is no P. O. Box on here for Mr. Tessier, is there?

A. No. And there may be some up here, to be entirely fair, that had been P.O. Boxes that we didn't record when we went through there. As best I could, I always put by renter. But I didn't do these originals. This was done by the phone company.

Q. But the question I'm asking is: Everywhere [Tr. 130] Tessier rentals appears on here, there is no address for Mr. Tessier, is there?

A. No, sir.

MR. ROBINSON: Okay. That's all I have.

MR. SMITH: May I request one more –

THE COURT: I want to see that. Mr. Robinson – he has it. Go ahead, Mr. Smith.

FURTHER DIRECT EXAMINATION

BY MR. SMITH:

Q. There are permits attached to these – to many of these addresses, aren't there?

A. I would say yes.

Q. Most of these permits have names, addresses, phone numbers?

A. Yes. Let me also say that on there is the original owners and things, and they haven't come back to us for a permit, many of them. It had to be a rental spot. So they wouldn't have permits because there was no reason – they was already living there. They were grandfathered in.

Q. That's fine. Where are you in relation to the tax office? Are you in the Livingston Parish courthouse?

A. No, sir. I'm across the road in the old former post office building, but not very far from the Assessor's office and the Clerk's office. And we work pretty closely

* * *

[Tr. 138] PATRICK TESSIER,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. State your name, please.

A. Patrick Tessier.

Q. Where do you live?

A. 1507 Cora Drive, Baton Rouge.

Q. Do you own land in Livingston Parish?

A. I do.

Q. Where is it?

A. Milton Road.

Q. Where is it in relation to the Combustion site?

A. Measurementwise?

Q. Yeah. Just geography, measuring geography.

A. There's pits on the right-of-way. It's within a 1,000 feet of it.

Q. How do you know this?

* * *

[Tr. 144] there was the list of all the people that lived on Milton Road, the addresses.

Q. And did you find your name there?

A. Yes.

Q. And did these indexes indicate anything?

A. Who owned – well, did they indicate anything?

Q. Had permits been issued?

A. Right, permits had been issued to turn on electricity, I think.

Q. And these permits, when you filled them out what did you have to include?

A. Name, address, phone number.

Q. Do you have any of those from before January of 1995?

A. I couldn't find them. I found one after that. I had a permit where I had a trailer I put back in the woods. I was going to put my brother-in-law in it and I filled it out and it was all in my name. But I think that is around in that period. I have done that before, but I couldn't find where I had done it.

Q. That is the same process you used when you applied for – everything listed on that list?

A. Right.

Q. Mr. Tessier, what is this?

A. That's the copy of the permit that they gave out [Tr. 145] to you to give you the street address and get your juice turned on.

Q. Who filled it out?

A. That doesn't look like my handwriting. I signed it.

Q. What does it contain?

A. Name, mailing address, proposed project site, phone number, section, township, range.

Q. What is the date on that document?

A. 5-10-95.

Q. So it was after January of '95?

A. Yes, it was.

Q. But you had done this process prior to January of '95?

A. I assume I had, but I couldn't find any.

Q. Do you remember having made application for permits?

A. I put in trailer spaces out there. I have a bunch of old houses and I've been going in between them and putting trailers spaces. So I – I – I've had my brother-in-law out there before so I assume I did it.

MR. SMITH: I note that this document is marked Tessier 4 and –

THE COURT: You want to introduce Tessier 4?

MR. SMITH: I would like to introduce Tessier 3 [Tr. 146] and Tessier 4.

THE COURT: Any objections to Tessier 3?

MR. ROBINSON: Tessier 4 I believe is irrelevant and immaterial.

THE COURT: Overruled. I will let them in.

MR. SMITH: Tessier 4 is the current notice for current tax purposes, and 3 is the permit application.

THE COURT: Just leave them on the podium for right now because Mr. Robinson may have some questions.

MR. SMITH: (CONTINUING)

Q. Mr. Tessier, how did you find out about this class action?

A. I got a call from Lewis Unglesby's office. A lady called and said that they wanted to send an appraiser out there to appraise the property.

Q. When was that?

A. July of '95.

Q. Who contacted you?

A. It was a young lady from Lewis Unglesby's office.

Q. Mr. Inman was here a little earlier, and he testified that he contacted you in April or May of '95. What do you recall about that?

A. I don't recall Mr. Inman at all. In fact, I had to call Mr. Unglesby's office lately to find out who their

actual appraiser was. I didn't know then when I talked to [Tr. 147] that young lady. They didn't say who was going out there.

Q. You have no recollection of speaking with Mr. Inman or anybody –

A. None whatsoever.

Q. – before July of '95?

A. Correct.

Q. Is this the same thing you stated in your initial affidavit, letter to the Court, asking for permission to apply to this class?

A. That is correct.

Q. After you were contacted by the lady from Mr. Unglesby's office seeking permission to appraise the land, what did you do?

A. Contacted you.

Q. What did you do next?

A. Well, Claude Peak is an old man out there that Your Honor let in the suit. He is an old fellow that I usually go by and help him out. He helps me also. And he had a bunch of papers from the steering committee, and I read those over. He wanted me to read them and explain to him what they were. And it was about the late filing, I assume, because I brought him up here when I came.

Q. And prior to this time, what actual notice or constructive notice did you receive about the pendency of this class action?

[Tr. 148] A. None.

Q. Did you ever refuse permission to have your land evaluated?

A. No.

Q. Did you ever express any hesitation about letting your land be evaluated?

A. The only person I talked to was a lady – a girl from Lewis Unglesby's office saying they wanted to go do it. I don't recall what I told them. I assume I told them yes. I called you after that.

Q. Did any of your tenants or anyone else tell you about the pendency of this action?

A. No.

Q. Again, where is your property in relation to the Combustion site?

A. Within 1,000 feet, according to my measurements.

Q. That maybe further from what they've been talking about as the center of the –

A. Yes. I'm going from that pit that is on the right-of-way. It is clear, you can see it. You can see the little white building down there.

Q. Mr. Tessier, I'm going to draw – show you a map which is a copy of the one that Mr. Pardue testified to earlier. I think that it is a blowup of the – a reduction of this map; is that correct?

* * *

[Tr. 156] are huddling around, you are going to start talking to one another and she is not going to hear you. So if you want a record, you have to speak up. Here we go.

MR. ROBINSON: (CONTINUING)

Q. Okay. That's one for the 80 acres there?

A. That is altogether there.

Q. Thank you. Now, Mr. Tessier, you testified that you had not known anything about this class action until you were contacted in the summer of 1995?

A. By Lewis Unglesby. July of '95.

Q. You never knew anything about this going on out there?

A. No. That particular – I lived out there when I first bought that property or right before I bought it, and that place used to blow up on a regular basis. And I never – you know, I moved away from there. My wife made us move away from there.

Q. You bought your property in 1982 and 1983, correct?

A. Right. I was living there when I bought it.

Q. And you lived on that property when you bought it?

A. Correct.

Q. So you were living on that property 1,000 feet from the site when you bought it in 1982 and 1983?

A. As I recall, yes.

[Tr. 157] Q. And you don't know anything about this class action?

A. They tell me this is current stuff, Combustion, Inc. I never heard of Combustion. I heard of Dubose Oil Company had it when I was there and it used to blow up regularly.

Q. Okay.

A. That's why we moved.

Q. But you heard about the class action being filed after this?

A. Just what I stated, July when he called me and said that he wanted to appraise that property.

Q. Do you know when they stopped operating that site?

A. Which company are you talking about?

Q. Well, Dubose, Combustion, whoever.

A. Dubose – I think Dubose moved and went to Florida or something. That is the only thing I heard about him.

Q. Was that – that site stopped operating before you bought this property; isn't that correct?

A. They stopped operating?

Q. Yeah.

A. Dubose?

Q. Dubose or Combustion, whoever it was.

A. No – I assume those tanks were there. The tanks were on the record. I assumed they were there. You know, I [Tr. 158] don't know.

Q. Did you subscribe to the Denham Springs News when you lived out there?

A. No.

Q. When did you move to Baton Rouge?

A. I'm not real sure. Let's see, I have a daughter that is 16. She was born – about 16 years ago. Is that close – about 16 years ago.

Q. So you moved to Baton Rouge about 16 years – it would be about 1981?

A. Well, I lived there – she may be 15.

Q. Well, let's go back. You bought the property in 1982 and '83; is that right?

A. Oh, that is absolutely correct. When I lived there could be in question. I was assuming I lived there when I bought it. I may have lived there before I bought it. I may have. My daughter is 16 years old, I know that for a fact. And she was born in Broadmoor and I know that for a fact. And she was the first one born over there, so the rest of them were born out that way.

THE COURT: So you weren't living there when you bought the property?

THE WITNESS: No.

THE COURT: All right.

THE WITNESS: Obviously not, since she is 16.

[Tr. 159] MR. ROBINSON: (CONTINUING)

Q. Where were you living when she was born?

A. Which one? I have four.

THE COURT: The oldest daughter, the first child born –

MR. ROBINSON: (CONTINUING)

Q. The one that is 16 years old.

A. That is the last one. She was born in Broadmoor.

Q. She was born in Broadmoor?

A. Yeah.

Q. And 16 from 1997 is '81.

A. So it was '81.

Q. It was 1981?

A. Correct. So I was there before I purchased the property that I lived out there.

Q. I see. But you did live in it when?

A. Right before she was born.

Q. Okay. Now, you've lived in Baton Rouge since at least 1981, now?

A. Correct.

Q. Did you subscribe to the Baton Rouge paper?

A. Right.

Q. Did you ever read anything about the class action, the hazardous waste lawsuit filed out there?

A. I may have.

[Tr. 160] Q. Let me show you some of these articles. Let's take a look at them. July 22, 1986. This is Section B of the Metro page. Suit filed in hazardous waste case. You don't remember anything about the Earl Dubose $10 billion lawsuit being filed? You didn't read about that in the paper?

A. I may have. I didn't – it didn't ring a large bell.

Q. December the 16th, 1990, expert blames Walker waste site for brain damage, Morning Advocate. You didn't read that?

A. I can't say that I did.

Q. December 20th, 1990, class action suit nearer. Lewis Unglesby, Combustion, Inc., Dubose, you didn't read any of that?

A. I stated I didn't.

MR. ROBINSON: Your Honor, I would like to offer these as a portion Volume V. They are in Volume V and they are notated through stickers that are sticking out.

THE COURT: We've already got them in. Aren't they in?

MS. DAUGHERTY: Yes.

THE COURT: We don't need them again.

MR. ROBINSON: (CONTINUING)

Q. You don't remember whether you gave Mr. Unglesby's [Tr. 161] lady that called permission to appraise your property?

A. I can't say that I did. I can't say if I told her to do it. I can't see that I wouldn't have, but –

Q. Just one last thing. You haven't paid any taxes for rental property out there? It has only been raw land; isn't that right?

A. I paid whatever they sent me.

Q. And while you were – did you drive on Milton Road when you lived out there?

A. Did I drive – yes.

Q. Since you have moved away from there have you gone back out there to look at your property and see how it is going?

A. Correct.

Q. Did you drive on Milton Road?

A. Correct.

Q. Did you ever see that big sign saying waste site with the skull and cross bones?

A. Saw that.

Q. When did you see it?

A. I can't recall but I've seen it.

Q. For years you've seen it there?

A. I guess whenever they put it up and I go that way. It is kind of hard to miss.

Q. You haven't seen any movement taking place out [Tr. 162] there, people moving chemicals away from the site or anything like that?

A. The cleanup and they redid the road, correct.

Q. You knew about that?

A. I saw them do it.

MR. ROBINSON: Okay. That's all.

THE COURT: Mr. Smith?

MR. SMITH: Just a few questions.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Things were a little bit unclear about when you actually lived on the property before. How long did you really –

THE COURT: That's not too unclear. He moved – he has been away from not living on the property since about 1981. So around that time when he moved to Baton Rouge. Maybe a little before, a little after. But he bought the property after he moved to Baton Rouge by his own account. Is that right?

THE WITNESS: That's correct.

THE COURT: All right. I'm not unclear.

MR. SMITH: (CONTINUING)

Q. Did you ever – do you recall ever reading about the Combustion, Inc. litigation in the newspaper?

A. Obviously there are a lot of articles there. I [Tr. 163] read the paper.

Q. Do you recall?

A. I start with the sports page. I don't recall reading the metro section, something about Livingston Parish.

Q. Well, you don't know?

A. I may have, but I don't recall. It didn't – I just don't, you know. It didn't –

Q. The skull and cross bone sign that is – what do they look like and where are they?

A. It is a sign yeah deep (indicating). I think the landowner next to the place put the sign up in his yard or against the fence. It is an older fellow that has a piece of property next to it.

Q. Does it say anything about the litigation that you noticed?

A. No.

MR. SMITH: That's all I have.

THE COURT: Anything else, Mr. Robinson?

MR. ROBINSON: No, sir, Your Honor.

THE COURT: I have a couple, Mr. Tessier.

THE WITNESS: Sure.

THE COURT: What is your educational background?

THE WITNESS: I have a business degree from LSU and an accounting degree.

[Tr. 164] THE COURT: You sounded like an intelligent and educated person. That's why I wanted to ask the question. You saw the cross bones and the skull and the big sign after they put it up when they started cleaning up the place?

THE WITNESS: I'm not real sure when they put it up, but I've seen that sign he was referring to. I didn't pay that much attention to it.

THE COURT: Let's presume that that sign has been up since around 1993. Would you agree with that?

THE WITNESS: No, I don't think it has been there that long.

THE COURT: You don't think it has been there that long?

THE WITNESS: No.

THE COURT: Do you know when they started doing the cleanup?

THE WITNESS: Not specifically. I know they cleaned it up and paved the road. That brought it to our attention.

THE COURT: So you remember when they were cleaning it up and paved the road?

THE WITNESS: Correct.

THE COURT: Have you ever been anywhere else around that site area? I mean, you own property there. [Tr. 165] Have you ever been to the Denham Springs area? Do you go into Denham Springs?

THE WITNESS: You come down Florida Street. I drive straight down Florida Street which goes through Denham Springs.

THE COURT: Do you have any relatives in Denham Springs?

THE WITNESS: No. They have passed on. My father-in-law and them are from Denham Springs.

THE COURT: Your wife has relatives there now?

THE WITNESS: None of them live there anymore. They live out in Springfield and – she has some stepsisters. The rest of them are in Baton Rouge.

THE COURT: Okay. Off of one of those highways they had a Combustion, Inc. litigation office. Did you know where that is?

THE WITNESS: It's – the one I took Claude Peak to was on Range Avenue in a shopping center.

THE COURT: Is that the one that has the big old – it looks like a 12-by-12 sign above it that says sign up here for Combustion, Inc., or something like that?

THE WITNESS: By the Baskin-Robbins. I remember the Baskin-Robbins on the corner. And they were back in the corner of it.

THE COURT: Okay.

[Tr. 166] THE WITNESS: Right off 190.

THE COURT: That is the first time you saw an office like that?

THE WITNESS: Correct.

THE COURT: All right. And you didn't see any of the notices that were placed in the Baton Rouge newspaper about the Combustion site?

THE WITNESS: No.

THE COURT: The notices themselves?

THE WITNESS: Did not.

THE COURT: All right. How would you collect your rent? Would they mail it to you or you would pick it up?

THE WITNESS: Some of them did. The old man they mentioned, Arthur Eby, used to collect rent for me out there.

THE COURT: He has been gone for a while, though?

THE WITNESS: A couple of years.

THE COURT: He collected rent for you?

THE WITNESS: Correct.

THE COURT: You didn't go out there and collect rent yourself?

THE WITNESS: From him.

THE COURT: From him?

THE WITNESS: Right.

THE COURT: Okay. How many rental pieces did you [Tr. 167] have over there? Let's say back in '93, '94 approximately?

THE WITNESS: Back then I had about nine.

THE COURT: About nine. Okay. In '95, how many did you have, about?

THE WITNESS: About 25.

THE COURT: About 25 in '95?

THE WITNESS: Well, 20 to 25. I got them pinpointed here with addresses on them.

THE COURT: Okay. Did you see any DEQ signs up or EPA signs up around that site when they were cleaning it up besides the skull and cross bones?

THE WITNESS: I think that is the only sign that is out there is the cross bone sign.

THE COURT: Indicating there was in fact a hazardous waste site or something?

THE WITNESS: It has a skull and cross bone. Big white sign.

THE COURT: Keep out?

THE WITNESS: No – I'm not sure what it has. It just has a skull and cross bones.

THE COURT: All right. And you said you lived there before you actually purchased it, obviously?

THE WITNESS: Yes.

THE COURT: You were living on the site itself in one of the homes you now rent?

[Tr. 168] THE WITNESS: Right.

THE COURT: About how long did you live there, do you remember?

THE WITNESS: Between four and five years.

THE COURT: Between four and five years. And they were actually doing the cooking and stuff then, the smoke – you said you heard explosions?

THE WITNESS: Yeah. A guy named Earl Dubose had it and it used to blow up. It blew up and we moved. I come in from work one evening and it had exploded and killed somebody and we left.

THE COURT: Because your wife wanted y'all to leave?

THE WITNESS: That's correct.

THE COURT: It may have been a smart move in retrospect.

THE WITNESS: That's correct.

THE COURT: Okay. I think that is all I have. Thank you very much.

MR. ROBINSON: I have –

THE COURT: No. I asked you first and you said you had none. That is how the game is played.

* * *

Supreme Court, U.S.
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IN THE
United States Supreme Court

OCTOBER 1998 TERM

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Patrick L. Tessier has limited his Petition for Writ of Certiorari to the issues actually decided by the Fifth Circuit Court of Appeals and the district court for the Western District of Louisiana. The Fifth Circuit equated the district court's difficulties with Mr. Tessier's credibility concerning any knowledge of the lawsuit with a finding of actual notice. See Petitioners' Appendix at pp. 15a and 4a. Accepting but not agreeing with the Fifth Circuit's interpretation, Mr. Tessier asserts that knowledge of the existence of a litigation does not equate with receipt of notice, especially where there is no evidence he knew any of the information Rule 23 notice would have afforded. The ruling of the Fifth Circuit illegally and unconstitutionally places a duty and burden on Mr. Tessier to investigate his rights and obligations and to prove what he did not know.

The Combustion, Inc. Plaintiff's Steering Committee (hereafter, Plaintiffs' Steering Committee), Respondents herein, offers no law in their opposition on these issues.

The Plaintiff's Steering Committee appears to attempt to confuse and misdirect the Supreme Court with their arguments. They argue the adequacy of notice by publication and general dissemination of information despite the clear direction of this United States Supreme Court in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 732 (1974) and the clear direction of the Fifth Circuit in its opinion on remand in this matter. Petitioners App. at 25a and 26a. They argue matters not addressed even by the district court concerning whether Mr. Tessier's name and address could have been identified through reasonable effort. In support of their arguments, the Plaintiffs' Steering Committee offers speculations but no facts concerning what Mr. Tessier and the district court thought, meant or knew. That Mr. Tessier reads the newspaper or had opportunity to speak with people is no proof that he had specific information concerning the Combustion, Inc. class action litigation. The district court stated its reasoning in its Ruling at Pet. App., p. 5a *et seq.*. This Ruling needs no amplification from the Plaintiffs' Steering Committee's speculation.

Management of class actions is cumbersome, but the difficulty of management does not lessen the class representatives' duty to notify identifiable class members. Placing the duty to investigate and the burden of proof on class members is a constitutionally and legally infirm practice under the Fourteenth Amendment and Rule 23.

ARGUMENT AND AUTHORITIES

Patrick L. Tessier respectfully submits this reply brief to rebut arguments and representations made by the Combustion, Inc. Plaintiffs' Steering Committee, the Respondents herein.

I. Issues before the Court

The issues raised by Mr. Tessier in his Petition for Writ of Certiorari stem from and are directly related to the written decisions of the district court and Court of Appeals for the Fifth Circuit. In its Ruling, Pet. App., p. 15a and Resp. App., p. 3a, the district court concluded as follows:

> While he (Mr. Tessier) may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit.

See also Pet. App., pp. 5a and 9a.

While grammatical construction of the district court's language does not necessarily lead to a conclusion that the district court found Mr. Tessier had any knowledge of the litigation, the Fifth Circuit construed the district court's statement and action to conclude the following at Pet. App., p. 4a:

> On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required.

Mr. Tessier maintains that he had no knowledge of the litigation. He does, however, accept that he would have little success challenging the Fifth Circuit's construction of the language.

Whatever difficulty the district court had with Mr. Tessier's credibility, there was no evidence presented, and the district court cited none in its Ruling, that Mr. Tessier had any knowledge of the information that Rule 23 (c)(2) notice would have provided. At best, the district court concluded Mr. Tessier had some knowledge of the Combustion, Inc. litigation. The Plaintiffs' Steering Committee's offers only speculation as to what Mr. Tessier may have read in the newspaper or might have heard from others to conjecture what specific information Mr. Tessier had concerning the litigation.

Mr. Tessier asserts that it is constitutionally and legally impermissible to equate a finding of some knowledge with the receipt of Rule 23(c)(2) notice and all the information required to be conveyed therein. Mr. Tessier also asserts that if he is an identifiable class member, he has no duty to inquire into his rights and obligations, at least not until he has the knowledge that notice under Rule 23(c)(2) would provide. He further asserts that without specific evidence of the particular knowledge that Rule 23(c)(2) notice would have afforded him, the Fifth Circuit and the district court placed the burden on him to prove what he did not know – a generally impossible task – in contravention of the Fourteenth Amendment and Rule 23 of the Federal Rules of Civil Procedure.

II. The Size of the Bell that "Did Not Ring" and Other Irrelevancies

A. Effect of Notice by Publication

Even though the argument bears little relevance to the issues raised by Mr. Tessier in his Petition for Writ of Certiorari, the Plaintiffs' Steering Committee argues throughout their opposition that their efforts at notifying class members were adequate under the circumstances of this litigation even as to identifiable class members. They do so even though the efforts cited by the district court in its

own Ruling and the Summary of PSC Operations provided at Resp. App., p. 4a *et seq.* show no notification sent to any class member who was not first known to the Plaintiffs' Steering Committee. Evidence at the hearing of this matter clearly established that no one was notified pursuant to Rule 23(c)(2) even though large numbers of class members were identifiable from the public records of Livingston Parish, Louisiana.

The Fifth Circuit stated as follows in its first opinion in this matter, Pet. App., pp. 25a-26a:

> Federal Rule of Civil Procedure 23(c)(2) provides "[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort..." Fed.R.Civ.P. 23(c)(2). In Eisen v. Carlisle & Jacqueline, the Supreme Court held "the importance of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses are ascertained through reasonable effort." Eisen, 471 U.S. at 1173; See also In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1097 (5th Cir. 1997)(stating that publication is not a substitute for personal notice if the individual's name and address were ascertainable through reasonable efforts).
>
> Mr. Tessier argues that his name and addres were readily discernible from the public records of Livingston Parish. If reasonable efforts would have uncovered his name and address, Mr. Tessier did not receive the personal notification to which he is entitled. Moreover, if he did not receive personal notification to which he is entitled, this amounts to good cause for not filing a timely proof of claim.

For the Plaintiffs' Steering Committee to now argue that their general effort to notify class members by publication were sufficient is disingenuous and at odds with the specific holding of this Supreme Court and of the Fifth Circuit in this matter.

B. Reasonable efforts to identify class members is not an issue here

The Plaintiffs' Steering Committee asks the Supreme Court to consider matters even the district court has not yet considered. Despite the direct order of the Fifth Circuit on remand, Pet. App., p. 27a, the district court has yet to consider whether reasonable efforts could have uncovered Mr. Tessier's name and address. These arguments are clearly inappropriate for review at this time.

Without going into great detail here on the issue of identifiability of class members, Mr. Tessier asserts that the contentions of the Plaintiffs' Steering Committee outlined at pp. 22 and 23 of their opposition brief are particularly disingenuous and incorrect. While there may not have been a permit application in the records from Mr. Tessier prior to 1995, his name appeared on indexes there at all pertinent times as a permittee. Resp. App., p. 58a. Anyone searching for Mr. Tessier could have taken his name over to the tax assessor's office and found his address. Resp. App., p. 61a. Further, the tax rolls contained a list of 60,000 entries of property listed by owner and address, Resp. App., p. 38a. All these owners, including Mr. Tessier, were identifiable class members. It would be difficult, as the Plaintiffs' Steering Committee suggests, to isolate just 20,000 of these owners, but such isolation would be pointless where all the property owners of Livingston Parish, Louisiana were class members. The tax assessor's roles listed virtually all of them.

C. The size of the bell that did not ring

The Plaintiffs' Steering Committee infers that counsel for Mr. Tessier deliberately omitted a material word from the transcription of the district court's ruling when the adjective "big" was omit-

ted from the transcription in reference to the bell Mr. Tessier said did not ring when he read the newspapers. The transcript of this matter shows that Mr. Tessier actually used the adjective "large". See the Plaintiffs' Steering Committee brief at p. 16. The district court's Ruling and the transcript provided show Mr. Tessier maintained he had no recollection of having read any notices in the newspapers. The size of the bell that did not ring is immaterial.

Nonetheless, counsel for Mr. Tessier here apologizes to the Court and to opposing counsel for the unintentional omission. Counsel for Mr. Tessier failed to catch the omission while editing the document. Counsel for Mr. Tessier would never intentionally jeopardize his credibility with the Court or give the Plaintiffs' Steering Committee an issue to contest. Please forgive the oversight.

D. Sidelining and other speculations

The Plaintiffs Steering Committee's brief is replete with unsubstantiated speculations about what motivated Mr. Tessier and the district court. Mr. Tessier suggests that had the Plaintiffs' Steering Committee done a proper analysis of which class members were identifiable with reasonable effort, it would not need to try to make an issue of Mr. Tessier's knowledge or motives. Nor would the Plaintiffs' Steering Committee need to speculate about the inferences the district court could have drawn. Rather, they could have safely pointed to their analysis and stated Mr. Tessier either was or was not identifiable with reasonable effort, and, therefore, entitled to notice or not.

Particularly absurd is the Plaintiffs' Steering Committee's speculation about sidelining by Mr. Tessier. Given the notice requirements of Rule 23(c)(2), Mr. Tessier would be playing a dangerous game with everything to lose and nothing to gain. Filing a timely proof of claim would have been a risk free way to protect his rights.

CONCLUSION

The issues before this court stem from the holdings of the Fifth Circuit Court of Appeals and the district court for the Western

District of Louisiana equating knowledge of the existence of a lawsuit with notice sufficient to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and of the United States Constitution, Amendment XIV. Such practice is legally and Constitutionally infirm. It places duties and burdens on class members to investigate and secure their rights before they know they have any interest in class action litigation. Knowledge is not notice.

While management of class actions may be cumbersome, the difficulties do not lessen identifiable class members' right to the fundamental and elementary requirement of due process that they be notified of their rights and obligations in a pending litigation. There is no evidence or finding in the record that Mr. Tessier had any actual knowledge of the information Rule 23(c)(2) notice would have provided him.

A practice that equates knowledge with notice, imposing a duty on a class member to investigate his rights before he reasonably knows he has any, while placing the burden of proof on him to prove what he does not know, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction. Mr. Tessier again asks this Court to grant a writ of certiorari in this matter.

Respectfully submitted this 2nd day of April 1999.

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